Nos. 115-116

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

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v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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PREVIOUS OPINIONS

The majority and dissenting opinions in the Circuit Court of Appeals on appeal from the order of the District Court denying respondents'

amended motion for a new trial (AR. 207–236) [1] are reported at 149 F. 2d 31. The memorandum opinion of the District Court denying the amended motion for a new trial (AR. 133–169) is not reported. The prior, unanimous opinion of the court below affirming the District Court's denial of respondents' original motion for a new trial (R. 578–585) is reported at 142 F. 2d 588. The memorandum opinion of the District Court on the original motion (R. 460–516) is not reported. The prior opinions of the Circuit Court of Appeals and of this Court on appeal from respondents' convictions are reported at 123 F. 2d 111 and 319 U. S. 503, respectively.

[1] The printed record in these cases consists of three separately printed records: The original four-volume record in this Court on review of respondents' convictions (Nos. 4 and 5, October Term, 1942); the single-volume record made on respondents' petition for certiorari for review of the judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, October Term, 1944); and a single-volume record of additional proceedings on respondents' amended motion for a new trial. In granting our petitions for writs of certiorari, the Court also granted our motion to treat and consider the records in Nos. 4 and 5, October Term, 1942, and in Nos. 153 and 154, October Term, 1944, as part of the instant record without reprinting. See Journal, October 8, 1945, p. 12. The first record on the motion for a new trial will be referred to by the designation "R." and the record of the additional proceedings on the amended motion by the designation "AR." Reference to the original record on review of respondents' convictions will be shown by explicit reference to the particular volume involved, as 1R., 2R., 3R., and 4R., respectively, Nos. 4 and 5, 1942 Term.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 2, 1945. (AR. 236–237.) The petition for writs of certiorari was filed on June 5, 1945, and was granted October 8, 1945. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying respondents' amended motion for a new trial purportedly based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial.

STATEMENT

Respondents' convictions were affirmed by this Court on June 7, 1943. Execution of the Court's judgment has been delayed since that time by proceedings on respondents' subsequently filed original and amended motions for a new trial which purportedly were based on allegedly newly discovered evidence that William Goldstein, a Government witness, testified falsely at the trial. After affirming the action of the trial court in denying respondents' original motion, the Circuit Court of Appeals, with one judge dissent-

ing, has now held that the respondents are entitled to a new trial.

The history of the proceedings and the nature of the review in the court below necessitate a somewhat extended statement of facts.

I

PRIOR PROCEEDINGS

On March 29, 1940, an indictment in five counts was returned against the respondents and others,[2] in the District Court for the Northern District of Illinois. The first four counts charged the defendant Johnson with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1936–1939, inclusive, and charged the other defendants with willfully aiding and abetting Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy. All respondents except Brown were found guilty on all five counts. Brown was found guilty on Counts 3 and 4, the substantive counts for 1938 and 1939, and on Count 5, the conspiracy count. Johnson was sentenced to concurrent sentences totaling five years' imprisonment and a $10,000 fine. Lesser concurrent sentences were

[2] The indictment was dismissed as to four defendants prior to trial, three defendants were acquitted by the jury, and the defendant Flanagan died pending review of the judgment of conviction against him. See R. 461, n. 1; *United States* v. *Johnson*, 319 U. S. 503, 520, n. 1.

imposed on the other respondents. *United States* v. *Johnson*, 319 U. S. 503, 505–506.

On appeal from the judgments of conviction, the Circuit Court of Appeals reversed principally on the ground that the indictment was returned by an illegally constituted grand jury. *United States* v. *Johnson*, 123 F. 2d 111 (C. C. A. 7th). This Court reversed the decision of the Circuit Court of Appeals (319 U. S. 503), sustaining the convictions of all respondents.

On June 25, 1943, less than three weeks after this Court affirmed the convictions, counsel for respondent Johnson wrote to the Attorney General, charging that William Goldstein, a Government witness, had committed perjury, and submitting affidavits intended to prove the charge of perjury. (R. 60–80, 159.) An extensive investigation was thereupon conducted by the Government, the results of which demonstrated that Goldstein had not testified falsely at the trial. (See letter written by the Solicitor General, as Acting Attorney General, to respondents' counsel on September 13, 1943, R. 265–266.)

In the meantime respondents took steps to and subsequently did obtain a remand of the case to the trial court for the filing of a motion for a new trial. (R. 9–10.) The motion (R. 13–17), filed on October 29, 1943, with leave of the trial court (R. 12), purported to be based on allegedly newly discovered evidence that Goldstein had testified falsely at respondents' trial. Numerous affidavits

were submitted in support of the motion (R. 81–242) and others were filed later (R. 336–338). Respondents also submitted a brief in support of the motion (R. 17–55), and the Government filed an answer (R. 55–58), a brief in opposition (R. 280–314), and a number of affidavits (R. 243–279, 315–316, 339–453). A hearing on the motion was had on November 15, 1943 (R. 454), before Judge Barnes (see R. 534–536), who had presided at the respondents' trial (Nos. 4 and 5, 1942 Term, 1 R. 1). The trial court filed a comprehensive opinion on December 28, 1943 (R. 460–516) and three days later entered an order denying the motion (R. 534–536).

On appeal the Circuit Court of Appeals unanimously affirmed the order of the trial court. (*United States* v. *Johnson*, 142 F. 2d 588 (C. C. A. 7th); R. 578–586.) In doing so the court stated that it had "carefully considered the record before us and the action of the trial court" (R. 583), that it could not say "that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely" (R. 584) and that the trial court had not abused its discretion in denying the motion (R. 583, 584, 585).

Respondents then filed a petition for certiorari (Nos. 153 and 154, 1944 Term), which the Government opposed. Shortly before the convening of the 1944 term of this Court and while the petition for certiorari was pending, counsel for respondents requested the Government to in-

form the Court that Theodore Goldstein, William Goldstein's son, had recently filed income tax returns covering the rentals from the Albany Park Bank Building. In line with his testimony with respect to other properties, William Goldstein had testified that he purchased the Albany Park Bank Building at respondent Johnson's request with money furnished by Johnson and took title in the name of his son Theodore, and that subsequently a quitclaim deed on the building was delivered to Johnson. (Nos. 4 and 5, 1942 Term, 2 R. 56–57; see also Appendix A, *infra*, pp. 120–121.)

Through a prompt investigation conducted by the Bureau of Internal Revenue, the Government verified the fact that amended and delinquent income tax returns on the Albany Park Bank Building had recently been filed by Theodore Goldstein, and also learned of the extraordinary circumstances under which they were filed. The investigation disclosed that the Chicago office of the Bureau of Internal Revenue received an anonymous telephone call in 1944 to the effect that the income from the Albany Park Bank Building was not being reported and that rents therefrom were supposedly being paid to William Goldstein who claimed that he was agent for his son, Theodore Goldstein; that a zone deputy collector interviewed William Goldstein a number of times thereafter, insisting that Theodore was liable for taxes on the income from the building; that Goldstein protested, repeatedly asserting that his son

was merely the record title owner, not the actual owner; and that after further persistent efforts by the deputy collector and his superior, Goldstein finally agreed to the filing of the returns by his son, which were prepared by the deputy collector, in order that the matter might be closed.

Although the Government felt that the filing of these returns was not inconsistent with Goldstein's testimony at the trial, and that the circumstances under which they were filed were such as to dissipate any relevance the returns might otherwise have had, the Government nevertheless acceded to respondents' request. In a supplemental memorandum we informed this Court of the filing of the returns and of the circumstances under which they were filed. On motion of the present respondents, the Court deferred consideration of the petition for certiorari conditioned upon the prompt filing in the Circuit Court of Appeals of a motion to reopen the proceedings on the motion for new trial and until the disposition of the motion by the Circuit Court of Appeals. (AR. 20–21.) This resulted in the second remand to the trial court (AR. 18–19) and dismissal of the petition for certiorari. 323 U. S. 806.

Pursuant to motion of the respondents (AR. 23–25), the trial court ordered the production of the income tax returns filed by Theodore Goldstein (AR. 26–27). Respondents then filed an amended motion for a new trial (AR. 27–36),

relying primarily on the filing of the returns by Theodore Goldstein to show that William Goldstein testified falsely at the trial. The Government filed an answer together with several affidavits which showed the circumstances under which the returns were filed. (See AR. 87–112.) Respondents filed a reply (AR. 112–132) and the hearing on the motion, held on December 11, 1944, was again before Judge Barnes, the trial judge (AR. 133). On December 15, 1944, Judge Barnes filed an opinion in which he reviewed the history of the proceedings in the case (AR 133–169) and again entered an order denying the motion for a new trial (AR. 171–173).

On this appeal, the majority of the Circuit Court of Appeals (Major, C. J., and Sparks, C. J.) held that the trial court had abused its discretion in denying the motion, basing its opinion primarily on the evidence submitted on the original motion. (AR. 207–230.) Judge Minton dissented, stating, among other things, that the additional evidence adduced in support of the motion added nothing to the proof that was submitted to the court on the original motion when the court, through the same three judges, had, after having "carefully considered the record" (R. 583), affirmed the action of the trial court in denying the motion (AR. 230–236). It is this action of the majority in granting respondents a new trial which is now before this Court for review.

II

TRIAL BACKGROUND OF CASE

A

Theory of prosecution—"Ownership of gambling houses" and "expenditure" theories of proof

The trial theory of the prosecution was that respondent Johnson was the proprietor of a number of gambling houses in and around Chicago from which he derived large amounts of unreported income, and that other defendants posed as the owners, thereby concealing Johnson's interest and aiding and abetting Johnson in his attempts at income tax evasion. The Government undertook to show that the various gambling houses, although ostensibly separately owned, were actually operated as a unit, thus indicating central control and ownership, and that Johnson was so identified with the gambling houses as to prove that he was the true owner. Considerable evidence was also introduced to show the magnitude of the operations of these houses, including their currency exchange transactions which reflected income to Johnson in excess of the amounts he reported in his income tax returns. The evidence on this aspect of the case has been referred to throughout the proceedings as relating to the "ownership" theory of proof. The testimony of Goldstein, alleged by respondents to have been false, had little bearing on this branch of the case, which turned on the issue of the proprietorship of gambling houses.

The Government went still further in proving its case. Evidence was introduced under what was termed the "expenditure" theory of proof, designed to substantiate the conclusion that Johnson had unreported income by showing that his cash expenditures during the periods covered by the indictment were in excess of his available declared cash resources, including his reported income. The showing on some of these expenditures was made initially through the testimony of Goldstein. Thus, among those expenditures was the purchase of the Albany Park Bank Building for some $59,000. Goldstein testified that he purchased the building at Johnson's request with funds supplied by Johnson, that he took title in the name of his son "Ted", and that a quitclaim deed was thereafter delivered to Johnson. (2 R. 56–57, Nos. 4 and 5, 1942 Term; Appendix A, *infra*, pp. 120–121.)

While each of these two theories of proof substantiated the other, as urged in the Government's Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 5–6, which contains a detailed summary of all the evidence, the Government's case rested predominantly upon the "ownership" theory of proof, the "central issue" and "only real problem before the jury," as this Court stated (319 U. S. at 516), being whether Johnson had a financial interest in the gambling clubs operated by the other defendants.[3] In

[3] The convictions of Johnson's co-defendants were necessarily, at least in part, predicated upon the "ownership"

passing on the sufficiency of the evidence, this Court stated (319 U. S. at 516–517, 518) that the evidence "amply justified" the jury in finding that the gambling houses were under a single domination and that Johnson owned a proprietary interest in the network of gambling houses; that the jury, having been justified in finding that the individual defendants were screens behind which Johnson operated, was also justified by "solid proof" in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. Moreover, adverting to the "expenditure" theory of proof, the Court stated that the conclusion that Johnson had large, unreported income was "reinforced" by proof that, certainly for the years 1937, 1938 and 1939, Johnson's expenditures exceeded his available declared resources. (*Id.*, at 517.) Goldstein's testimony was concerned primarily with some of those expenditures and had at most only a relatively minor bearing on Johnson's ownership of and the computation of the unreported income from the gambling establishments.

B

Goldstein's testimony

The testimony of Goldstein, contained in the trial record (2 R. 55–68, Nos. 4 and 5, 1942

theory of proof, for, as this Court indicated in its opinion (319 U. S. at 518), they were guilty of aiding and abetting Johnson's attempts at income tax evasion only if they consciously were parties to the concealment of Johnson's interest in the gambling clubs of which they pretended to be proprietors.

Term) is reproduced at pages 118–137, *infra*, as Appendix A to this brief.

Briefly, Goldstein was shown certain escrow agreements, later introduced in evidence, which revealed the details of the purchase of several properties and of two escrow deposits on unconsummated sales. The details disclosed the fact that Goldstein was the purchaser and that, as to all of the purchased properties except one (Sunny Acres Farm), title had been taken in someone else's name, e. g., his law partner Isadore Goldstein, or his son Theodore, or one of his stenographers. In addition to such facts disclosed by the foregoing documents, Goldstein testified to the following three facts with respect to each item: (a) That he made payment in currency; (b) that the money was given to him by respondent Johnson with the request that he make the purchase or escrow deposit, as the case might be; and (c) that a quitclaim deed was subsequently delivered to Johnson, except in the case of the two escrows involving unconsummated sales. The properties and amounts involved were as follows:

Sunny Acres Farm, consisting of two parcels, one of Sunny Acres and one of adjoining Du Page County real estate, purchased separately, $161,500 (2 R. 59–60, Nos. 4 and 5, 1942 Term);

9730 So. Western Avenue, $13,115 (*id.* 55–56);

The Dells, $19,000 (*id.* 59);

Albany Park Bank Building, $59,887.05 (*id.* 56–57); and

Bon Air Country Club and adjacent properties, which included the Bon Air Country Club, $75,000, the Curran Farm, $63,800, the Green House, $8,500, the White House, $8,000, and a gas station, $4,000, all purchased separately—total $169,300 (*id.* 57–59).

The two escrow deposits were in the amounts of $10,000 and $7,500, the $10,000 deposit being made on property lying between Bon Air and the Curran Farm.

When questioned on cross-examination regarding the property at 9730 So. Western Avenue, Goldstein stated that he did not know whether Johnson got full title to the property and was not sure whether anyone else was interested in it. (Appendix A, *infra,* p. 131.) After being shown the deeds to Johnson, he recollected that Johnson received an undivided one-half interest by conveyance from Ann Homan and her husband, who got title through Isadore Goldstein, Goldstein's nominee, and stated that, as he remembered, Skidmore got the other half. (*Id.,* p. 133.) He reiterated, however, that he was positive it was Johnson who gave him the money to make the purchase. (*Id.,* p. 134.) As to The Dells property, Goldstein testified on cross-examination that "I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (*Id.,* p. 135.)

Goldstein was not cross-examined at all with respect to any of the other properties or either of the two escrows. The reason given was that respondents had no further information bearing on the other matters regarding which Goldstein had testified. (*Id.*, p. 137.) The failure to cross-examine Goldstein with respect to Bon Air is especially significant, because when Johnson later took the witness stand he asserted he had only a one-half interest in the various Bon Air properties (as well as in 9730 So. Western Avenue and The Dells) and attempted to explain away the fact that Goldstein had quitclaimed full title to him by stating that Skidmore had purchased the properties in his, Johnson's, name. (See *infra*, p. 32.) Although Goldstein was kept under subpoena by respondents until the close of the trial six weeks later, no attempt was made to call him for further testimony. (R. 488–489.)

Like some of the witnesses who testified for the Government in connection with the "ownership" theory of proof (319 U. S. at 516), Goldstein was a reluctant and "obviously unwilling" witness. As he testified on cross-examination, he had been indicted along with Johnson and the other defendants. (2 R. 65, Nos. 4 and 5, 1942 Term.) And although that indictment had been dismissed as to him before trial,[4] he was still

[4] The indictment, in addition to being dismissed as to Goldstein and Skidmore, was dismissed as to Orrie Alexander and Bernice Downey. (Nos. 4 and 5, 1942 Term, 3 R. 1010.)

under indictment for perjury in another connection, as he also testified on cross-examination. (*Ibid.*) No doubt these factors induced Goldstein to be "quite circumspect" in testifying, as the trial judge states he was. (AR. 168.) Goldstein's credibility was sharply in issue at the trial. The foregoing facts were all before the jury and the "truth" of his testimony was squarely challenged. (3 R. 977, Nos. 4 and 5, 1942 Term; see also 2 R. 87.)

C

Corroboration of Goldstein's testimony

Goldstein's testimony was in large part corroborated by the trial record or not disputed. Respondent Johnson himself corroborated Goldstein's entire testimony with respect to the purchase of the Sunny Acres Farm and adjoining Du Page County real estate, admitting that he was the sole owner of the two pieces of property. (Nos. 4 and 5, 1942 Term, 3 R. 982–983.) Title to the adjoining Du Page County property, like the titles to the other properties as to which Goldstein testified, had been taken in the name of a nominee, and a quitclaim deed subsequently delivered to Johnson. (*Id.*, 2 R. 60.) Goldstein's testimony that he used currency for the escrow deposits and purchases of the other properties as to which he testified (9730 So. Western Avenue, The Dells, Albany Park Bank Building, and Bon

Air) has never been disputed.[5] As to the delivery of deeds to these properties, Johnson admitted that Goldstein had delivered the deeds to him for *full* title to the Bon Air proporeties, including the Curran Farm (*id.*, 3 R. 973–974), and that Goldstein had handled the purchase of the property at 9730 So. Western Avenue and delivered deeds to him on that property (*id.*, 3 R. 974), the deeds being of a one-half interest, as Goldstein had testified and as the deeds, introduced in evidence, showed (*id.*, 2 R. 64). Johnson admitted that he owned a one-half interest in The Dells (*id.*, 3 R. 955, 977), from which it may be inferred that he received a deed for at least the one-half interest Goldstein unequivocally testified he had. Thus, the trial record incontrovertibly establishes that a substantial part of Goldstein's testimony was true. The remainder of his testimony—that regarding the purchase of the Albany Park Bank Building and as to Johnson's giving him the money to make the purchases of 9730 So. Western Avenue, The Dells, and Bon Air—was also corroborated.

Goldstein's testimony in connection with the purchase of the Albany Park Bank Building was corroborated at the beginning of the trial by an admission which Johnson's counsel, Mr. Thompson,

[5] For corroboration of his testimony as to payment in currency, see, e. g., Nos. 4 and 5, 1942 Term, 3 R. 574–575, as to purchase of Bon Air Country Club property; *id.*, 3 R. 926–927, as to purchase of The Dells; *id.*, 3 R. 575–576, as to the $7,500 escrow deposit.

made in his opening statement in the presence of respondent Johnson. At that time Johnson's counsel stated (*id.*, 2 R. 3–4):

> We will prove that Mr. Johnson had absolutely nothing to do with this currency exchange [located in the building], had no interest in it whatever, he never cashed a check there, he never exchanged money there, he never bought a money order there, he never received a dime of income from the place.
>
> *Mr. Johnson owned either the building or an interest in the building.* It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. *Mr. Johnson either by himself or as partner with somebody bought this building as an investment.* It was there being operated. The safety deposit boxes were being rented and operated for the convenience of the people in the neighborhood and for others.
>
> We will prove that there was a woman there in charge of these safety deposit boxes and as Mr. Brown's attorney, Mr. Hess, has said, that this building was rented by the currency exchange for fifty dollars a month, I think it was. *The money was going to the agent who had charge of the building and being spent for any expenses to maintain the building.* Mr. Johnson got no income from this building at all, *but Mr. Johnson did own the building,* * * *. [Italics supplied.]

The agent referred to was Goldstein (see *infra*, p. 28), a fact which will be seen to explain many of his subsequent actions with respect to the building—actions now relied upon by respondents as showing the falsity of his testimony. At the moment it is sufficient to note that this quoted statement by Johnson's counsel reflected an accurate knowledge of the history of the building and its operation, as the evidence later disclosed, and that the assertion that Johnson owned the building was never retracted during the trial, although Johnson, when he took the stand toward the end of the trial and denied practically all of the damaging evidence against him, also denied having given Goldstein the money to purchase, or of having any interest in, the building.[6]

Goldstein's testimony that Johnson gave him the money to purchase these properties also has substantial corroboration in the trial record. As

[6] When the case was in the Circuit Court of Appeals, Johnson's trial counsel stated in a reply brief that he was employed by Johnson the day before the case was called to trial and made his opening statement to the jury on the second day of the trial, that he undertook to get the complicated story in his mind in the few hours available, that he was in error in stating that Johnson had an interest in the building but that as the trial progressed he forgot about it and did not ask to make a correction after he learned the fact. (R. 334, note.) As already stated, however, counsel's description of the property was an accurate one. Moreover, counsel's admission, so unequivocally stated and repeated several times, was particularly significant since it was based upon information that he had so recently received from Johnson and before too long a time had elapsed within which to plan the strategy for the defense.

already stated, the Du Page County real estate, which Johnson admitted Goldstein purchased for him, was purchased in the same manner as 9730 So. Western Avenue, The Dells, the Albany Park Bank Building and Bon Air, that is, with currency and with title being taken in the name of a nominee and a quitclaim deed subsequently being delivered to Johnson. Johnson's admission that Goldstein delivered deeds of full title to him for the Bon Air properties warrants the inference that Johnson gave Goldstein the money to make the purchases of the various parcels of which Bon Air was constituted, irrespective of whether Johnson may later have quitclaimed a one-half interest to Skidmore. Johnson's admission that it was planned that a gambling room would be run at Bon Air (*id.*, 3 R. 968–969) is significant in view of the fact that the "ownership" theory of proof showed Johnson to have been the proprietor of a string of gambling houses. Johnson's admission that he had a one-half interest in 9730 So. Western Avenue, The Dells and Bon Air (*id.*, 3 R. 960, 973, 977, 982, 983) made it as likely as not that he had been the one to give Goldstein the money to purchase the properties. All of the purchases were made in currency and Johnson was the one person shown by the record to transact his business in cash, admitting that he habitually carried $12,000 to $15,000 in cash in his pockets. (*Id.*, 3 R. 965, 976, 985–986.) Further, although Johnson denied at the trial that Goldstein had purchased any of

these properties for him (except the Sunny Acres Farm and adjoining Du Page County real estate), in November of 1939 Johnson told revenue agents that Goldstein had bought the property at 9730 So. Western Avenue for him (*id.*, 2 R. 118), that he owned that property and also Bon Air (*ibid*; *id.*, 4 R. 8) and, when asked about the cost of the properties, referred the agents to Goldstein (*id.*, 4 R. 8).

D

Expenditure theory of proof and, so far as pertinent here, the evidence adduced in connection with it

While respondents' motions for a new trial were purportedly based on the ground that Goldstein testified falsely at their trial, the motion evidence for the most part is cumulative of that adduced at the trial on issues which were before the jury on conflicting evidence, the motion evidence being designed to disprove conclusions which the jury might have drawn. Accordingly, it may be helpful to explain those issues in detail, to state the trial evidence relating to them, and to show, at the same time, the connection of Goldstein's testimony.

As already stated, Goldstein's testimony was a part of the "expenditure" theory of proof, which was designed to show that respondent Johnson's expenditures during the years involved exceeded his available declared cash resources, including his reported income. This theory of proof neces-

sarily required a computation of Johnson's expenditures and available declared cash resources for the benefit of the jury. At the end of the Government's case in chief, the Government submitted such a computation through the testimony of expert witness Clifford, who had prepared it. The computation showed the total of the excess of Johnson's expenditures over his available declared cash resources to be $474,349.54 (Nos. 4 and 5, 1942 Term, 4 R. 15), but the jury was of course advised that this was on the basis of the Government's evidence. Later, when Johnson took the witness stand, he admitted additional assets or expenditures, not described as such, of approximately $200,000. (R. 23.) In our Brief on Reargument in Nos. 4 and 5, 1942 Term, these additional expenditures were reflected in the computation we submitted to this Court (which is for convenience reprinted as Appendix B and attached to the inside of the back cover of this brief), with the result that, after certain adjustments were made on some of the other items, the computation, on the basis of the Government's evidence, reflected a total of $640,387.86 as the excess of Johnson's expenditures over his available declared cash resources.

At the end of the trial, respondents, through the testimony of their expert witness Sullivan (*id.*, 3 R. 991–995), submitted a computation based on their evidence which showed the total of Johnson's expenditures over his available declared

cash resources to be $432,310.30 less than the Government's figure (*id.*, 3 R. 992). This figure, which did not take into account the additional expenditures or assets admitted by Johnson, left a total excess of some $42,000. Thus, with the additional expenditures or assets admitted by Johnson, there was an excess of some $240,000 even according to respondents' computations.

The difference between the Government's computation and that of respondents resulted principally from a conflict in the evidence as to whether Johnson made all of the expenditures with respect to the Bon Air properties, including the Curran Farm, or only one-half thereof. The Government's evidence in this connection is summarized below (*infra*, pp. 25–34) and, it may be noted at this point, consisted of a great deal more than Goldstein's testimony. Indeed, Goldstein's testimony related only to the original purchase; he did not testify as to the improvement expenditures of some $548,000. (See Exhibit B, *infra*.) As will be seen, the great bulk of the allegedly newly discovered evidence submitted by respondents on their motions for a new trial is designed to prove that Skidmore had an interest in Bon Air and that Johnson therefore was not the sole owner. However, the crucial issue on the question of Johnson's expenditures was whether he in fact made the expenditures involved and not whether Skidmore may have emerged with an interest in the properties thereafter. Goldstein's

testimony was strictly and carefully limited to the outlays initially made by Johnson in the purchase of these properties.

Part of the remaining difference between the computation of the Government and that of respondents resulted from a difference in the expenditure charges for the property at 9730 So. Western Avenue, The Dells and the Albany Park Bank Building, as to which Goldstein had testified. The Government's computation charged Johnson with the full purchase price of those properties and with the full cost of a building on the property at 9730 So. Western Avenue. In accordance with Johnson's testimony, respondents' computation omitted the purchase price of the Albany Park Bank Building and charged Johnson only with one-half of the purchase price of the other properties and with one-half of the cost of the building at 9730 So. Western Avenue. (*Id.*, 3 R. 992–993.) The total difference in respect of these expenditure charges was only approximately $85,500.

Whether Johnson had made the disputed expenditures was of course an issue for the jury to resolve on the conflicting evidence. This evidence, which was recited in our Brief on Reargument in Nos. 4 and 5, 1942 Term, pages 100-108, will be set forth below, in the same manner except for minor variations, together with the amount *in dispute* as to each property. This evidence relates only to the propriety of charging

Johnson with the amounts specified, since the amounts themselves were established by other evidence, the purchase prices of the properties, for instance, by the escrow agreements which were introduced in evidence as exhibits. Johnson's corroboration of Goldstein's testimony regarding the purchase of the Du Page County real estate, for which payment was made in currency and as to which title was taken in the name of a nominee and a quitclaim deed subsequently delivered to Johnson, evidence which is not mentioned below but which might have been considered by the jury as to all of the properties, since they were purchased in the same manner.

9730 So. Western Avenue (amount in dispute, $17,757.50, representing one-half the cost of the land and the building placed on it).—Goldstein testified that he purchased the real estate comprising this property, a number of vacant lots, in 1937, that he purchased the various lots at Johnson's request and received the amounts of the payments from Johnson in currency, that title to the parcels was variously taken in the names of his law partner or his secretary and that subsequently quitclaim deeds were delivered to Johnson. (Appendix A, *infra*, pp. 118–120.) On cross-examination Goldstein stated that a deed for one-half of the property was made to William R. Skidmore, but that he was positive it was Johnson who had given him the money to make the purchase. (Appendix A, *infra*, pp. 133–134.)

A building was constructed on the property in 1937. The supervising architect, Nadherny, who was called as the court's witness, testified that he was working for Skidmore when Skidmore told him he had a friend [Johnson] who wanted to put up a building. Johnson explained to the architect the type of building desired and ordered the preparation of plans. Nadherny stated that he received the money which he paid out for the construction of the building in part from Skidmore and in part from Johnson but said that he felt the payments were being made by Skidmore in Johnson's behalf, "like an agency." (Nos. 4 and 5, 1942 Term, 2 R. 74, 75, 79, 83–84, 85, 88–89.)

Two revenue agents related a conversation which they had with Johnson in November of 1939. Both stated that Johnson told them he was the owner of 9730 So. Western Avenue. (*Id.*, 2 R. 117–118, 4 R. 8.) One testified that Johnson said nothing as to whether Skidmore had an interest in the property although he had asked him. (*Id.*, 2 R. 118.) In a formal statement given by Johnson on March 27, 1939, and introduced in evidence, Johnson stated that he had had no business transactions with Skidmore, except a loan he had made to Skidmore. (*Id.*, 2 R. 411.)

Respondent Johnson testified that he owned one-half of the property at 9730 So. Western Avenue and that he had contributed to the purchase of the land and cost of the building subse-

quently built on it. He denied that he ever told the agents he was the sole owner and stated he told them he was part owner. (*Id.*, 3 R. 955, 959.) On cross-examination he stated that he bought the property at Skidmore's suggestion and paid one-half of the purchase price to Skidmore and that the two of them decided to build the building and he paid one-half of the cost. (*Id.*, 3 R. 973–975.)

The Dells (amount in dispute, $11,057.95 representing one-half the cost of the property).—Goldstein testified that he purchased the two parcels comprising this property at Johnson's request, that he received the purchase money from Johnson in currency, and that he delivered quit-claim deeds to the property to Johnson. (Appendix A, *infra*, pp. 123–124.) On cross-examination he stated that he did not remember whether Skidmore owned half of the property, that he was of the opinion that Johnson owned it all, but that "that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (Appendix A, *infra*, p. 135.)

Johnson testified that he owned only a one-half interest in The Dells and that he paid Skidmore for that one-half interest. He denied that he had made any arrangements with Goldstein for its purchase. (Nos. 4 and 5, 1942 Term, 3 R. 955, 970–971.) An attorney, testifying for the defense, stated that he represented the sellers of The Dells and carried on negotiations with Goldstein for the sale. He said that he talked to Skid-

more about the purchase, and obtained Skidmore's approval as to the price. He further said that he never saw Johnson in connection with the transaction. He admitted that Goldstein paid him the purchase money at later dates. (*Id.*, 3 R. 926–927.)

Albany Park Bank Building ($59,887.05 for purchase of property).—Goldstein testified that he purchased this building on July 16, 1937, at the request of Johnson, that he received the amounts of the original deposit and final payment in currency from Johnson, that title to the property was taken in the name of his son, Ted W. Goldstein (as in the case of the Bon Air Country Club and adjacent houses), and that a quitclaim deed was subsequently delivered to Johnson by his son. (Appendix A, *infra*, pp. 120–121.) The Lawrence Avenue Currency Exchange, operated by the respondent Brown and in which the business of Johnson's gambling houses was carried as a single account,[7] was located in this building after July 1938. (Nos. 4 and 5, 1942 Term, 3 R. 587.) Two employees at the building testified that Goldstein reemployed them and became the spokesman for the building in July, 1937. (*Id.*, 3 R. 587, 590, 595, 599.)

Johnson denied that he owned any part of the building and stated he had not employed Goldstein

[7] See our Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 29–30, 55–64.

to purchase it, had never given Goldstein money to purchase it, and that no deed to it had ever been given him. (*Id.*, 3 R. 955.) However, this testimony must be considered in relation to the admission of Johnson's counsel (*supra*, pp. 18–19), made in his opening statement and never retracted during the trial, that Johnson owned the building, having either purchased it himself or as a partner with someone.

Bon Air Country Club and adjacent properties (including the Curran Farm) (amount in dispute, approximately $353,000, representing one-half the cost of the properties and improvements).—Goldstein testified that he made the purchase of these various properties at Johnson's request, that he received the money for the purchase payments from Johnson in currency, that he took title to the properties in the names of nominees (the nominee for the Bon Air Country Club and two adjoining houses being his son, Theodore Goldstein, as in the case of the Albany Park Bank Building), and that quitclaim deeds were subsequently delivered to Johnson. (Appendix A, *infra*, pp. 121–123.) Goldstein's testimony dealt only with the expenditures for the purchase of these properties, and not with any of the extensive improvements. His testimony showed an aggregate expenditure of $169,300 for these properties (see p. 14, *supra*), and since Johnson does not dispute one-half ownership, only one-half thereof, or $84,650 is in dispute.

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An officer of the bank which sold the country club property testified that he negotiated the sale with Goldstein and received payment in currency from him. The witness said that he met no principal other than Goldstein and that he had no contact or dealings with any other person than Goldstein. (*Id.*, 3 R. 574–575.)

Johnson admitted that Goldstein had delivered the deeds to him and that title to the property stood in his, Johnson's, name, although, among other things, Johnson stated that he signed a quit-claim deed to Skidmore for a one-half interest. (*Id.*, 3 R. 963–965.)

The country club property was operated as a night club during 1938 and 1939 by a corporation known as the Bon-Air Catering Company, Inc. (*Id.*, 2 R. 48; 3 R. 896–897, 956.) Fifty-four shares of the corporation's capital stock were registered in the name of and held by Johnson, twenty-four shares by the defendant Wait, twenty shares by the respondent Hartigan, and one share each by two employees.[8] (*Id.*, 2 R. 55; 3 R. 775, 912, 964.). An accountant employed by the accounting firm which prepared and audited the corporation books testified that in the fall of 1939 he asked Johnson for details as to the payment of the various amounts of stock and that Johnson in-

[8] Some time after the formation of the company one of the employees died, and his share was transferred to Johnson, thereby increasing Johnson's holdings to fifty-five shares. (Nos. 4 and 5, 1942 Term, 3 R. 912, 956, 964.)

structed him to charge all of the amount to his (Johnson's) account. This entry was made by the accountant in the corporation's books. (*Id.*, 3 R. 775–776.)

Large expenditures for improvements on the Bon Air property during 1938 and some in 1939 were entered as assets on the Catering Company's books. These amounts were variously credited to Johnson, Wait, one Geary and Roy Love. An accountant for the auditing company stated that he discussed these charges with Johnson in 1939 and that Johnson told him that all of these items had been advanced by him and should be credited to him rather than scattered among the four accounts. The accountant was likewise instructed by Johnson that these should never have been on the corporation's books and should be taken off. Accordingly, he took the asset accounts off the corporation books and merged the small credit remaining in Johnson's account. (*Id.*, 2 R. 53–54.)

Skidmore's name did not appear on any of the Bon Air records. (*Id.*, 3 R. 982.)

Although Johnson said he and Skidmore were partners, they did not file a partnership income tax return. (*Id.*, 3 R. 983.)

In November 1939 Johnson told revenue agents that he owned the Bon Air Country Club and did not mention that Skidmore had any interest in the property. (*Id.*, 2 R. 117–118; 4 R. 8.) In his statement of March 1939, Johnson had said that

he had had no business transactions with Skidmore. (*Id.*, 2 R. 411.)

Johnson testified that he owned one-half of the Bon Air properties and that Skidmore owned the other half. He denied that he had anything to do with the negotiations for the purchase of the property and that he ever gave Goldstein money to pay for the property. He stated that Skidmore purchased the property and took title in Johnson's name because he did not want title in his own name; that he, Johnson, later contributed his one-half of the price; and that each of them thereafter contributed equally to the expenditures for improvements and operations. (*Id.*, 3 R. 955–957, 961–965, 967–970, 979, 982, 983–984.) Johnson denied that he had told the revenue agents he was the sole owner of Bon Air and said that he told them he was part owner. (*Id.*, 3 R. 959, 963.) He explained his statement about never having business transactions with Skidmore by saying that the conversation related to gambling and that he thought the question asked related to gambling transactions. (*Id.*, 3 R. 963.)

The defendant Wait gave similar testimony as to the ownership of Bon Air. (*Id.*, 3 R. 896–898, 900, 910–913.)

The defense also introduced miscellaneous other evidence for the purpose of attempting to prove that Skidmore had an interest in Bon Air. The

witness Hare stated that he had acted for Skidmore in negotiations with the bondholders with respect to the purchase of Bon Air and later took Goldstein to Becker, who represented the seller, to discuss the deal. (*Id.*, 3 R. 914–915.) Becker, with whom the deal was made, testified that Goldstein conducted the negotiations and that he received a letter from Goldstein, introduced in evidence (Def. Ex. J–6), in which Goldstein stated he was representing "clients." (*Id.*, 3 R. 574–575.) An alleged agent for the seller stated that Goldstein told him that before the deal was closed he would have to see "a couple of other people." (*Id.*, 3 R. 576.) Nadherny, a court witness, testified that part of his architect's fee was paid by Skidmore and part by Johnson. (*Id.*, 2 R. 81.) Another witness stated that Skidmore paid for some electrical work at Bon Air. (*Id.*, 3 R. 916–917.) A wholesale grocery company was shown to have "Skidmore and Johnson, Bon Air Country Club, Wheeling, Illinois" on its ledger cards (*id.*, 3 R. 919–920, 1037), while the invoices of a refining company were addressed to "Bon Air Country Club, W. R. Skidmore, Wheeling, Illinois" (*id.*, 3 R. 930, 1037). Two persons who were employed at Bon Air testified that both Skidmore and Johnson participated in its management. (*Id.*, 3 R. 893–894, 923.) Four other witnesses recited instances of acts by Skidmore indicating that he was connected with the management or operation

of the property. (*Id.*, 3 R. 916, 922, 925, 928.) Certificates of title to trucks owned by the Bon Air Country Club were shown to bear Skidmore's signature. (*Id.*, 3 R. 956.)

Two escrows (one of $10,000 and one of $7,500.)—Goldstein testified that he entered into the escrow agreements and made the deposits with currency he received from Johnson. The $10,000 escrow involved acreage located between the Curran Farm and the Bon Air property. (Appendix A, *infra*, p. 126; see also Nos. 4 and 5, 1942 Term, 3 R. 575–576.)

Johnson stated that he did not furnish Goldstein with the money for these deposits and knew nothing of the transactions. (*Id.*, 3 R. 957.)

III

ALLEGEDLY NEWLY DISCOVERED EVIDENCE ADDUCED ON MOTIONS FOR NEW TRIAL

The evidence which respondents relied upon in support of their motions for a new trial may be classified into three groups, as follows: (1) Evidence of alleged admissions by Goldstein of the falsity of his testimony; (2) statements and conduct by Goldstein allegedly inconsistent with his trial testimony; and (3) evidence which is either hearsay or merely cumulative of similar evidence introduced at the trial on the issue whether Johnson was the sole owner of some of these purchased properties.

A

Evidence of alleged admissions by Goldstein of the falsity of his testimony

Affidavits by Hess, respondent Johnson, and Johnson's brother.—Respondents presented the affidavits of Hess, counsel for Johnson's co-defendants at the trial; respondent Johnson; and Johnson's brother, John E. Johnson, an attorney. These affidavits all describe a supposedly accidental meeting in Hess' office between Hess, Goldstein and the two Johnsons which took place some time during the period February to April, 1941, when Hess was writing his brief on appeal from respondents' convictions. (R. 126, 221, 233, 245.) All three affidavits contain almost identical language, such as that Johnson said to Goldstein "Why did you lie?" and that Goldstein replied in substance that he was "sorry" that he did. (R. 126–127, 221–222, 234.)

The Hess affidavit states that respondent Johnson inquired "of Goldstein as to why he testified that 'he bought those properties for me when you know you bought them for Skidmore. Why did you lie?' Goldstein replied in substance that he was sorry that he did but that he was a victim of circumstances and stated that he preferred not to discuss the matter." (R. 127.) It is evident that this affidavit is artfully worded so that it could be read to mean that Goldstein said he was sorry he *testified,* or that he was sorry he *lied.* In an effort to clarify that ambiguity, a Govern-

ment investigator, Special Agent Read, interviewed Hess, and prepared a memorandum setting forth the substance of the interview. Hess signed that memorandum stating that "it agrees with my recollection of the discussion referred to" (R. 247), and the memorandum contains the following crucial passage (R. 246):

> With respect to the statement in Affidavit No. 19, "Goldstein replied in substance that he was sorry that he did." Mr. Hess informed me that he is unable to clarify this statement since that is his best recollection of what was said. Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say.

Moreover, it should also be noted that although Goldstein's purported admission of perjury to Hess and the two Johnsons is said to have occurred in the early part of 1941, their affidavits are dated respectively, June 16, 1943, September 21, 1943, and September 29, 1943 (R. 127, 223, 241), *after* the decision of this Court affirming the convictions.

By affidavit, Goldstein asserted that the only statement he made in Hess' office was that he did not care to discuss his testimony. (R. 249.) This agreed with part of Hess' statement. Goldstein also stated in his affidavit that the meeting with Hess, Johnson and Johnson's brother was a

"frame up," that he was told to change his testimony if he knew what was good for him, that he was threatened and that Johnson kept pushing his fingers in his face, and that he finally called his associate, Isadore Goldstein, and left with him. (R. 248–249.) In his second affidavit, Hess admitted that Goldstein came to his office pursuant to a phone call from Hess (R. 227) and that Goldstein phoned Isadore Goldstein and left with him (R. 228). While Hess and the two Johnsons all deny that Goldstein was threatened or that any violence took place, Johnson's brother admits that Johnson pointed his finger in the direction of Goldstein's face and put his hand on Goldstein's knee (R. 222), and the memorandum of the interview by Special Agent Read, which Hess signed, contains the following (R. 246–247):

> Mr. Hess stated that the interview described in Affidavit No. 19, lasted about one-half hour, to the best of his recollection, and that the talk at times was rather heated, particularly on the part of John Elmer Johnson. He states that William Goldstein was not roughly handled, although at one stage of the conversation, William R. Johnson, after having repeatedly urged William Goldstein too [sic] admit that his court testimony was false, placed one hand upon Mr. Goldstein's knee and pointed the other hand toward Mr. Goldstein's face with the forefinger and second finger of that hand spread in the form of a "V."

The trial court concluded that Hess' affidavit was "worthy of but little consideration" and "cannot be taken to be evidence that Goldstein committed perjury." (R. 478.) These conclusions were based not only on Goldstein's affidavit but also on the memorandum of the interview with Hess by Special Agent Read, from which the court concluded that Hess' affidavit could as well be taken to mean that Goldstein said he was sorry he testified at all as it could be taken to mean that he was sorry he had lied; on the court's conclusion that the meeting was arranged by Hess in order that the two Johnsons might confront Goldstein and persuade him to recant; and the conclusion that if Goldstein had recanted the defendants would have done something about it at that time, some two years earlier, when the case was first on appeal from their convictions. (R. 478–479.) The trial court also stated that the relationship between Johnson and his co-defendants (represented by Hess) was so close that the final argument to the jury on behalf of all defendants was made by Johnson's counsel, who also conducted the examination on direct of three of Hess' clients. Noting the obvious interest of Johnson and his brother, the trial court stated that their affidavits called for little comment. (R. 479.)

Green.—Actually, only one affiant unequivocally purports to testify to recantation by Goldstein.

Green, a disbarred lawyer[9] working as a salesman in a bakery shop (R. 477), made three affidavits. In the first one he made no mention of Goldstein's alleged admission (see R. 125–126), despite the fact that according to respondent Johnson, Green "volunteered to make known his knowledge and information regarding the matter" (R. 239). In his second affidavit, executed the day following the first one, Green says that "subsequent to October 1940" (the month the trial ended), Goldstein told him that "his testimony regarding purchases of properties for the said William R. Johnson was false" and that on or about March 15, 1942, Skidmore phoned Green to come over, stated that he wanted his advice concerning a partition suit filed by John E. Johnson on the Bon Air property, and that Goldstein, who was present, stated that Skidmore could not file an answer in the suit because if he did it would definitely establish that his trial testimony was false. (R. 100–101.) Green's third affidavit states that on August 11, 1943, after Goldstein knew Green had executed the second affidavit, in which Green stated that Goldstein had admitted that his testimony was false, Goldstein waited for Green outside the bakery shop

[9] See *People* v. *Green*, 353 Ill. 638, 642, 643, where the court referred to Green's conduct as "unprofessional and dishonorable," denoting "lack of good moral character," and stated that "his offenses have been numerous and grave."

and again admitted the falsity of his testimony.[10] (R. 216.)

In separate affidavits, Goldstein denied having had the conversations with Green related by Green in his second affidavit (R. 243) and stated that Green's third affidavit was totally false and the purported meeting and conversation a pure fabrication (R. 264). Goldstein also explained that he had known Green for the past 20 years but had "never been intimate or a confidant with him"; that Green had been disbarred as a lawyer for the past eight or ten years and that he saw very little of him except that a number of times in the past few years Green had begged small sums of money from him, which he gave Green because Green was hungry. (R. 243.)

The trial court rejected Green's affidavits as too improbable to be true, it being unlikely that Skidmore and Goldstein would seek the advice of Green, a disbarred lawyer working as a bakery salesman, regarding the partition suit; or that Goldstein, after knowing of the execution of Green's other affidavits, would seek out Green to tell him a second time that his testimony was

[10] Engelbretson, an employee at the bakery, corroborates the fact that Green met someone and states that he later identified the person as Goldstein. (R. 232–233.) However, Green says that it was when he left the bakery shop that he saw Goldstein walking to and fro across the street, that Goldstein approached him, and that they then had the conversation Green relates. (R. 216.) Engelbretson, on the other hand, says that when he and Green were in the tavern next to the bakery shop he called Green's attention to the man walking to and fro across the street. (R. 232.)

false; or that Goldstein would make a general admission that his testimony "regarding purchases of properties" for Johnson was false when it is incontrovertible that a large part of it was true, including his entire testimony with respect to the Sunny Acres Farm and adjoining Du Page County property, testimony which was corroborated by Johnson himself. For these reasons and the number of opportunities Green gave himself to talk to Goldstein, the trial court concluded that Green had discredited himself. (R. 477–478.)

B

Statements and conduct by Goldstein allegedly inconsistent with his trial testimony

Bon Air.—This is the property as to which Johnson, while asserting that he owned only a one-half interest, admitted Goldstein had quitclaimed full title to him. As the Government showed on respondents' motion, even the insurance policies were transferred from Theodore Goldstein, the record title holder, to Johnson. (See particularly, R. 419, 431, 445.)

Fowler, a former employee of Goldstein who had been discharged for issuing an unauthorized check (R. 264, 265, 267–268), states that Goldstein told him that Skidmore gave him the money to buy Bon Air (R. 213). If true, this alleged statement by Goldstein is directly in conflict

with his testimony that Johnson gave him the money to purchase Bon Air.

Goldstein denies that he made the statement attributed to him by Fowler and states that Fowler has been unfriendly toward him ever since he discharged him. (R. 264.) Attorney Lidschin reveals that suit was brought to restrain Fowler, his son and daughter-in-law and a bank from cashing the unauthorized check issued by Fowler. (R. 267.) As the trial court noted (R. 479), Fowler did not even give the approximate date Goldstein was supposed to have made the alleged statement. Evidence submitted as to one of Fowler's other statements also casts a reflection on his credibility, as the trial court noted. (R. 479–480.)[11]

[11] Fowler stated that he called Goldstein's attention to a bill which Bon Air owed the Waukegan Post (run by Goldstein), that Goldstein said he would see Skidmore about it, and that it was paid a few days later. (R. 214.) Goldstein stated that he had instructed Fowler to send an advertising solicitor to the Bon Air club to see Mr. Johnson about advertising in the Waukegan Post and to get their printing, engraving and art work, that the business was received, and that after the account was long past due and uncollected he told Fowler to turn the account over to an attorney by the name of Joe Miller, who later started suit and collected the bill. (R. 264.) That suit was started and a bill against Bon Air collected was shown by court records and the affidavit of the attorney who handled the matter and did work for Joe Miller. (R. 266–273.) On respondents' amended motion for a new trial they submitted an affidavit by defendant Wait who states that he had full knowledge of the ordering and receipt of merchandise at Bon Air, that he or-

Respondents themselves offered testimony on their motion which, although hearsay, tends to prove that Skidmore did not give Goldstein the money to purchase Bon Air. Respondents' affiant Sperling, floorman and special guard at Bon Air (R. 104), states that in June, 1939, Skidmore gave Garry (cashier at Bon Air (R. 105)) a wrapped package, stating that it contained $50,000 "to be applied against his share *of the cost of the property* and the cost and maintenance of the Club" (italics supplied) and that on several other occasions

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dered material from the Waukegan Post on April 16, 1941, and that the attached invoice (AR. 76) was the only one which resulted in suit between Bon Air and the Waukegan Post (AR. 75–76). The affidavit and invoice were apparently submitted to corroborate Fowler's statement and refute that of Goldstein and the attorney on the theory that the goods were ordered after Fowler had been discharged by Goldstein (see AR. 167), the invoice being dated July 8, 1941, and the date "4–16" indicating the order or delivery date of the goods. The trial court stated that he did not believe Wait's affidavit had the effect of corroborating Fowler's statement, noting that the defendant Wait testified at the trial that he was 72 years of age and a professional gambler since 1893. (AR. 167.) The trial court's conclusion seems a proper one in view of the fact that, since it is not customary to institute suit to collect a small bill ($57.60) two months after it is invoiced or even five months after the goods are ordered or delivered, it would appear that the July 8, 1941, invoice was one of a number sent to Bon Air for the same goods and that the date "4–16" referred to the year 1940, when Fowler was employed by Goldstein. It will be remembered that Goldstein said that "after the account was long past due and we could not collect it" he instructed Fowler to turn it over to Joe Miller for collection. (R. 264.) Fowler was employed by Goldstein up until January, 1941. (R. 265.)

Skidmore delivered money in amounts of $10,000 and $20,000 to Garry, telling Garry to apply the money on his account of cost and maintenance (R. 105).[12] If Skidmore was paying for his share of the purchase price of the Bon Air properties in 1939, as Sperling testifies, he of course could not have given Goldstein the money to purchase the property in 1937, when the purchase was made.

Albany Park Bank Building.—In this building was located the Lawrence Avenue currency exchange operated by respondent Brown, which carried Johnson's gambling house funds as a single account. (*Supra,* p. 28.) This is the building which Johnson's counsel admitted in his opening statement that Johnson owned, having either purchased it himself or as a partner with someone—the same and only property in which Johnson later denied having *any* interest. It is also one of the properties as to which Goldstein became agent after purchase. Like Bon Air, title to the building was taken in the name of Goldstein's son Theodore. Respondents apparently urge that Goldstein's acts with respect to this building show that he or his son Theodore, rather than Johnson or Skidmore, owns the building.

(1) Amended and delinquent income tax returns filed by Theodore Goldstein, Goldstein's son, re-

[12] Garry corroborates the fact that Skidmore gave him the $50,000 on one occasion and $10,000 and $20,000 on other occasions, but states that it was for the payment of bills. (R. 107.)

porting the rents from the Albany Park Bank Building (AR. 47–74) were the principal new matter submitted to the trial court on respondents' amended motion. Respondents placed pivotal reliance upon these returns, arguing that they showed that Goldstein testified falsely at the trial when he stated that Johnson gave him the money to purchase the Albany Park Bank Building.

Theodore Goldstein, a college student from 1933 to 1938 (AR. 90) who was in the Army from December 11, 1942 (AR. 97), stated by way of affidavit, submitted on respondents' amended motion, that he is the record title holder of the Albany Park Bank Building, not the actual owner; that he never had any interest in the building and has never claimed any interest in it or any income or interest in any income derived from it; that he has at no time received any rents, interest, profits or any other income from the property; that he filed income tax returns for the years 1941, 1942 and 1943 (see AR. 93–97) in which he did not list the rentals from the building as income to him, because he did not receive the rentals and did not regard himself entitled to them; that in the summer of 1944 he signed delinquent income tax returns for the years 1937 to 1940, inclusive, and amended returns for the years 1941, 1942 and 1943 because his father told him that the Internal Revenue Department insisted that he was required to file the returns as record title holder (AR. 89–91). The affidavits

of William Goldstein, Deputy Collector Wodrick and Division Chief Schulz all reflect that numerous conversations were held with William Goldstein regarding payment of income tax on the rentals from the building; that Goldstein repeatedly told the Treasury representatives that his son was merely the record title holder, not the actual owner; and that the returns were filed upon the insistence of the Treasury representatives that Theodore, as record title holder, was liable for tax on the rentals from the building. (AR. 98–99, 104, 105, 110–111.) All three affidavits also reveal that Goldstein refused to sign a statement to the effect that his son was the "owner" of the building (see Gov. Ex. No. 2A, AR. 101) and prepared his own statement to accompany the returns in which Theodore was described as "title holder of record." (AR. 100, 106–108, 111.) Wodrick also confirms Goldstein's statement that Wodrick prepared the income tax returns which were signed by Theodore Goldstein. (AR. 99, 105–106.) [13].

(2) Among other things, Wodrick's affidavit, filed by the Government, states that Goldstein told him "that he received money from persons unknown for the purchase of that building"

[13] Wodrick also confirms Goldstein's statement that he absolutely refused to pay a tax for his son pursuant to a 1937 income tax return prepared by Wodrick to collect a tax on the $60,000 purchase price of the Albany Park Bank Building. (AR. 99, 106.)

(AR. 104) and respondents have apparently relied upon this as meaning that Goldstein said he did not know who gave him the money to purchase the Albany Park Bank Building (see, e. g., Brief in Opposition, Nos. 115, 116, this Term, p. 16). Wodrick's full statement in this connection was as follows (AR. 104–105):[14]

> Q. When you first contacted Mr. William Goldstein in regard to the ownership of the Albany Park Building, did I understand you to say that Mr. William Goldstein declared he did not know who owned that property?
>
> A. That is right.
>
> Q. What else did William Goldstein say at that particular time in regard to the collection of rents or the ownership of that property?
>
> A. He was rather surprised to hear a question as that as to who was the owner of the building. He said it was all a part of court record and the testimony previously given, and he also stated that he received money from persons unknown for the purchase of that building. He also stated that he didn't know whether it was Skidmore's or Johnson's money. I also

[14] Wodrick's affidavit is the one from which we originally derived our information regarding the filing of these income tax returns by Theodore Goldstein—the only information we had at the time we filed our supplemental memorandum in Nos. 153 and 154, 1944 Term, in which, at respondents' request when the case was pending on respondents' petition for certiorari, we advised the Court of the filing of these returns.

> asked Mr. William Goldstein the purpose of placing the title in Theodore Goldstein's name, and he replied that at one time William Johnson had an idea of opening a bank, to be located in the building at 3424 Lawrence Avenue, known as the Albany Park Bank Building, and he did not want to disclose the identity of the owners of the building to the people in the neighborhood. I asked Mr. Goldstein whether the rent money was held in an account for the purpose of returning that money to the person or persons to be later identified as the owners of the building. Mr. Goldstein replied that he merely kept the money, but did not have a special account for that purpose.

In a second affidavit, Wodrick explains, with reference to the statement that Goldstein said he received money from persons unknown for the purchase of the building, that (AR. 109–110):

> What I meant and intended to say at that time was that Goldstein stated to me that he did not know whose money it was that he had received for the purchase of that building. At no time did I ask Mr. Goldstein who gave him the money for the purchase of that building and at no time did he say that unknown persons gave him the money to purchase that building.

While Goldstein's statements to Wodrick point to prior ownership of the building by Johnson (see also, R. 253) and a present uncertainty as

to the true owner. Goldstein did not, of course, testify at the trial as to the *ownership* of the building.

In the affidavit by Goldstein filed on respondent's amended motion for a new trial, when respondents were relying primarily upon the filing of the income tax returns by Theodore Goldstein on the rentals from the Albany Park Bank Building to show the falsity of Goldstein's testimony, Goldstein stated (AR. 100):

> At this time I reaffirm the testimony given by me in the trial of the case of *United States* vs. *William R. Johnson, et al.*, concerning the Albany Park Bank Building and, in particular restate that the amount expended for the purchase of the Albany Park Bank Building property was $59,887.05 and that I got that money from Mr. Johnson in the form of currency.
>
> In conclusion I state that I do not have and never did have any right, title or interest of any kind in the property at 3424 Lawrence Avenue, Chicago, Illinois [the location of the Albany Park Bank Building], or in its rents, profits, income or issues, and do not now and never have claimed any such right, title or interest.

(3) Other evidence reflects instances in which Goldstein, having become "spokesman" for the building when it was purchased (*supra*, p. 28), continued to act as agent for the building. The

affiant Blockus states that after the building was placed in receivership on July 26, 1943, because of a tax lien, Goldstein offered to apply the rents from the building on the delinquent taxes. (R. 198–200.) Leases were handled through Goldstein and executed in the name of Theodore Goldstein, the record title holder. (R. 200–206; AR. 76–77, 79–85.) Goldstein collected the rent from the building. (AR. 77.) These things Goldstein admits. (R. 252, 263–264.) He states that the rent money is being held by him until such time as he is released from the lien served by the "Internal Revenue Department" on him to hold all funds and property belonging to Johnson.[15] (R. 252.)

(4) Sampson, upon whose affidavits the Government has relied, in an affidavit submitted by respondents states that Goldstein made the statement to him that "Johnson never had any interest in the property and has nothing whatever to do with it." (AR. 77–78). The statement was supposed to have been made in a conversation

[15] The record shows that Johnson's brother, in addition to Goldstein, has stated that there is a tax lien on Johnson's property and funds. (R. 249–250.) We are advised by the Bureau of Internal Revenue that a number of individuals and companies were served with liens on Johnson's property and funds, that Goldstein was served in April, 1940, and that the Government has not attempted to make collection, it being customary in cases of this kind, where there has been a criminal trial and where the matter is still pending before the Tax Court, to postpone collection until such time as a final decision has been reached as to the income tax liability.

regarding a lease option and can be interpreted as meaning that Johnson has never concerned himself with the building, and that he has never had anything to do with the operation, maintenance or leasing of the building. Moreover, the alleged statement, if it in fact had been made, must be considered in relation to the undisputed evidence of Goldstein's agency for the building and to the admission of Johnson's trial counsel that Johnson owned the building. Goldstein admits that he had discussions with Sampson relative to an option to renew the lease then in existence but denies that he made the statements Sampson attributes to him. (AR. 100.)

(5) Respondents' affiant Blockus states that in his conversations with Goldstein regarding the state tax lien on the Albany Park Bank Building Goldstein said that the property was his. (R. 198–200.) Goldstein denies that he made such a statement (R. 263–264) and says that he told Blockus that "You understand that there is a Government lien against the property and for that reason the party owning the property has not paid his taxes" (R. 263). Blockus admits that Goldstein said that the Government had a lien on the property. (R. 198–200.) Such a statement by Goldstein is in effect an assertion that Johnson owned the property, for the lien is on all funds and property belonging to Johnson. (See R. 249–250, 252.) Goldstein's alleged statement that the property was his—which would be inconsistent with his statement that there was a lien on the

property—is supposed to have been made when Levine and Sampson were present at the county treasurer's office. They both testified by affidavit that they were present during the whole conversation between Goldstein and Blockus and that they did not at any time hear Goldstein make a statement that the property was his (R. 262–263), although in a subsequent affidavit submitted by respondents, Levine states that he did not hear all of the conversation between Goldstein and Blockus (R. 228–229).

It may be noted parenthetically at this point that while respondents seemingly contend that Goldstein or his son Theodore owns the building they also submitted evidence intended to show that Skidmore owns it.[16]

In summarizing the evidence as to the Albany Park Bank Building, the trial court stated in his first opinion that respondents had not presented any affidavit stating that the money for the purchase of the building was not given to Goldstein by Johnson (R. 492), thus that "None of the affidavits now presented show that Goldstein, in testifying concerning this property, perjured himself" (R. 492), that Johnson's counsel admitted

[16] Respondents' affiant Miss Sommer, a former stenographer in Goldstein's office, states that she typed income and disbursements statements of the vault company located in the building and mailed them to Skidmore. (R. 165–166.) However, Miss Sommer's statements were at least partially refuted by Goldstein's submission of typed copies of the income and disbursements statements shown to have been prepared by a Miss Koop, an employee at the vault company. (R. 254–259.)

in his opening statement that Johnson owned the building, having either purchased it himself or as a partner with someone, and that consideration of the foregoing impels the conclusion that (R. 494)—

> the situation with regard to the Albany Park Bank Building, from an evidentiary standpoint, is not affected by any allegedly new material now offered by these defendants, and that the issue as to whether or not Johnson gave Goldstein the money to buy the Albany Park Bank Building for him remains as it was before the jury.

In his opinion on the amended motion, the trial court added (AR. 166):

> In the light of that admission made on the trial [by Johnson's counsel], it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

Escrows.—In response to evidence submitted by respondents, Goldstein admits that when the escrow agreements on the two unconsummated sales were not fulfilled by the vendors he served notice cancelling them, receiving the $7,500 escrow deposit, which he did not return to Johnson because of the Government's lien, but not receiving the $10,000 escrow deposit. (R. 260–261.) Fowler, the employee Goldstein discharged for issuing an

unauthorized check and who Goldstein says has been unfriendly to him ever since, states that Goldstein told him he had $7,500 on deposit in escrow at the State Bank of Evanston and later told him he had withdrawn it. (R. 214.) Goldstein denies that he discussed the escrow deposit with Fowler. (R. 264.)

Guild (trustee for the property involved under the $10,000 escrow agreement (R. 138–139)) and Holleran (attorney for the beneficiaries and trustee (R. 128–129)) state that in their conversations with Goldstein regarding the withdrawal of the $10,000 escrow deposit, Goldstein stated that the money was his[17] (R. 133, 141, 214). However, Guild and Holleran also reveal that the $10,000 escrow agreement resulted from the institution and dismissal of a trespass suit relative to property located between Bon Air and the Curran Farm (R. 133, 141), properties as to which Johnson admitted at the trial he owned a one-half interest and contended Skidmore owned the other one-half.[18] Guild and Holleran also corroborate

[17] In conflict with this evidence is the statement of respondents' affiant Hendricksen that Skidmore told him the money was his. (R. 95.)

[18] Johnson, Skidmore, Goldstein and Peacock were apparently the defendants in the trespass suit. (See R. 128, 138.) In December 1937 Goldstein was the holder of a majority of the bonds secured by a deed of trust on the Bon Air country club and Peacock, an attorney formerly in Goldstein's office (R. 188), was appointed trustee under the deed of trust (R. 196).

Goldstein's statement that the vendors had not fulfilled the terms of the escrow. (R. 130–132; cf. R. 141.) Sullivan, attorney for Guild in the trespass suit, reveals in an affidavit filed by the Government that he suggested to Goldstein that there was no lien on the $10,000 escrow and that part of it could be applied in settlement of the Bon Air trespass suit; that Goldstein replied that the money was Johnson's; that Goldstein refused to withdraw and pay over the money out of the escrow fund unless Sullivan obtained a letter or some form of written authority from Johnson; and that Goldstein stated he would follow Johnson's instructions in making disposition of the fund.[19] (R. 250.) Goldstein makes the same statement as Sullivan with respect to his release of the escrow money pursuant to authorization from Johnson (R. 251–252) and states that the money was deposited in his, Goldstein's, name "for the purpose of not disclosing the identity of the purchaser," that he did not recall at any time stating that it was his money, and that "This

[19] Sullivan also states that he was advised by Johnson's brother and attorney Charles R. Barrett that Johnson could not settle the case because he was not solely liable, if at all, that the damages claimed were excessive, and that Johnson's assets were tied up by a Government lien, but that if Sullivan could secure a settlement from the $10,000 escrow fund "it was agreeable to Mr. Johnson's counsel, in view of the fact that (according to them) the money was not Johnson's and it was up to Goldstein to do what he saw fit with it." (R. 249–250.)

money was given to me by Mr. William R. Johnson and it is his money." (R. 252.)

The trial court recited all of the facts with respect to these escrows (R. 490–491) but made no particular comment with respect to them, except that he stated, with reference to the $7,500 escrow deposit, that "The taking of the money down shows no more than the putting of it up and adds nothing that is not merely cumulative" (R. 513).

C

Hearsay and cumulative evidence

The bulk of respondents' motion evidence is either hearsay, or evidence which is substantially identical to that submitted at the trial by respondents. All of this evidence, except a small portion with reference to The Dells, bears on the question whether Skidmore had an interest in Bon Air and the adjoining Curran Farm.

The Dells.—The evidence as to this property is repetitious of that produced at the trial (cf. R. 117–118, 231–232, with Nos. 4 and 5, 1942 Term, 3 R. 926–927) and the most important part of it submitted through the affidavits of Hare and Herman, persons who testified at the trial for the defense (R. 474).[20]

Bon Air, including the Curran Farm.—The hearsay evidence with respect to the Bon Air properties is composed of alleged statements by

[20] See also, R. 95, 175, 177–179, 189, and Goldstein's affidavit, R. 260.

Skidmore which, for the most part, merely indicate that Skidmore had an interest in the properties.[21] Since the evidence was hearsay it could not have been used at the trial already had and cannot be used on a new trial. Were this not true, it would be pertinent to consider the prior availability of the so-called evidence, most of the affiants having been either employees at Bon Air or tenants on one of the properties.

The evidence which is similar to that adduced at the trial (see *supra*, pp. 32–34) and designed to

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[21] As to Bon Air country club, see affidavits of Henricksen (R. 83–84, 90, 91, 95); Green (R. 126); Shaffron (R. 81); Papin (R. 109); Fowler (R. 215). As to Curran Farm, see affidavits of Marie Schmidt (R. 191–192); John Schmidt (R. 192–193); Smith (R. 114); Peters (R. 187); and Kemp (R. 121–122). As to White House, see affidavit of Henricksen (R. 85, 88, 93). As to Green House, see affidavit of Henricksen. (R. 84.) Helen Henricksen's affidavit recites what her husband told her Skidmore told him. (R. 96–98.)

Some of this hearsay evidence is directed toward a showing that Goldstein's trial testimony as to Bon Air was false. Henricksen, the caretaker at Bon Air (R. 83–84) who testified as a state witness in the Roger Touhy and Hugh Banghart trials and described his own active participation in the kidnaping of John Factor (R. 277), states that Skidmore told him that he bought Bon Air, that Johnson would have a one-half interest in it but Johnson did not know about it yet, and that he bought the Curran Farm and did not intend to let Johnson have an interest in it (R. 84, 93). Nadherny, who testified at the trial, states that he heard Skidmore say that he bought the Green House (one of the Bon Air properties) as a surprise gift to Johnson. (R. 98–99.) It will be noted that these alleged statements by Skidmore as to the Green House and White House do not coincide with Johnson's admission that he owns and paid for a one-half interest in these two properties.

show that Skidmore has an interest in Bon Air consists of the recitation of instances where employment of persons, work to be done, or supplies to be furnished were discussed with both Johnson and Skidmore jointly;[22] instances of payment of bills by Skidmore;[23] and acts by Skidmore reflecting ownership of Bon Air, such as his giving instructions as to improving and operating the country club or Curran Farm.[24]

Of the 21 affiants on whose testimony this evidence is based, one testified at the trial,[25] five were subpoenaed and not called to testify,[26] and five others were employees or performed services at the Bon Air country club.[27] The most significant testi-

[22] Affidavits of Shaffron (R. 81–82); Henricksen (R. 88); Nadherny (R. 99); Schwefer (R. 102); Love (R. 103); Garry (R. 106); Papin (R. 108); Smith (R. 110); Irwin (R. 173); Tyrell (R. 176–177); Berkley (R. 186).

[23] Affidavits of Shaffron (R. 82–83); Henricksen (R. 86, 87, 92, 94); Love (R. 103–104); Sperling (R. 105); Garry (R. 107); Jacobs (R. 162); Hoffman (R. 163); Piazza (R. 166–167); Weil (R. 176); Wagner (R. 179–180).

[24] Affidavits of Henricksen (R. 85–86, 87–88, 89, 90, 91–92, 93–94); Helen Henricksen (R. 97); Nadherny (R. 99); Love (R. 103–104); Sperling (R. 104–105); Garry (R. 106, 107–108); Papin (R. 108–109); Smith (R. 110–112); Piper (R. 119); Kemp (R. 120–122); Green (R. 125–126); Piazza (R. 166–167); Weil (R. 174–175); Barrett (R. 169–170); Walter Peters (R. 124–125); Stewart Peters (R. 187).

[25] Nadherny. (Nos. 4 and 5, 1942 Term, 2 R. 72–89.)

[26] Garry, Smith, Sperling, Piper and Piazza. (R. 474–475.)

[27] Roy Love, one of the so-called stockholders in the Bon Air Catering Company (R. 103); Papin, captain of waiters (R. 108); Irwin, golf professional (R. 173); Weil, laborer doing construction work (R. 174); Tyrell, who booked the shows at Bon Air (R. 176–177).

mony is that of Garry, who states that he was cashier at Bon Air during the summers of 1938 and 1939 "and in said capacity had charge of moneys taken in and paid out both in cash and by check" (R. 106) and, among other things, that Skidmore paid him $50,000 in cash at one time for payment of bills at Bon Air and at other times when the cash was low gave Garry varying sums in the amounts of $10,000 and $20,000 (R. 107). Garry was subpoenaed at the trial but not called to testify (R. 244, 474–475), although Johnson admitted on cross-examination that Garry had come to see him "and wanted to know if he could be of any assistance" at the trial (Nos. 4 and 5, 1942 Term, 3 R. 965). In his closing argument to the jury, Johnson's counsel said he had talked to Garry twice the preceding week and accepted the responsibility for not producing him as a witness. (R. 475.) Sperling, who gave testimony somewhat similar to that of Garry, was also one of the persons who was subpoenaed but not produced as a witness. Roy Love, who was intimately connected with the financial affairs of Bon Air and whose testimony is now offered on respondents' motion, was subpoenaed by the Government during the trial but could not be found. (Nos. 4 and 5, 1942 Term, 3 R. 778–780.)

Peacock, who also was subpoenaed by respondents (R. 342–343) but not called to testify, and Miss Marsh reveal that full title to each of the Bon Air properties, including the Curran Farm,

was transferred to Johnson and that deeds signed by Johnson and conveying a one-half interest to Skidmore were prepared (R. 163–164, 188). This evidence that Johnson conveyed a one-half interest to Skidmore—evidence on which the Circuit Court of Appeals placed so much reliance in its decision granting respondents a new trial (AR. 224–225)—was before the jury through respondent Johnson's testimony (Nos. 4 and 5, 1942 Term, 3 R. 964) and might have been corroborated at the trial by Peacock, *since he was under subpoena* by respondents. The fact that all title was first transferred to Johnson tends, of course, to corroborate Goldstein's trial testimony with respect to the purchase of these properties.

Fowler, the employee who was discharged by Goldstein for issuing an unauthorized check, purports to recite statements by Goldstein indicating that Skidmore had an interest in Bon Air. (R. 214–215.)

On the other hand, as the Government showed, Skidmore, when he testified at his own trial for income tax evasion, was asked when he had purchased his interest in Bon Air and replied, "I never had any interest in it." (R. 316.)

IV

ACTION OF TRIAL COURT ON RESPONDENTS' AMENDED MOTION

The trial court's two opinions denying respondents' motions for a new trial contain an

exhaustive review of all of respondents' motion evidence. (R. 474–514; AR. 151–167.) In each opinion Judge Barnes, the trial judge, states that before passing on the motions he refreshed his recollection of what transpired at the trial. (R. 466–474, 515–516; AR. 168–169.) His ultimate conclusions on the amended motion were as follows (AR. 167–168):

> Having considered in detail each separate item of allegedly newly discovered evidence, including not only that now proposed by the movants to be presented to a jury, but also that by their motion filed in 1943 proposed by the movants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. No adequate reason has been presented for the delay of more than four years in the presenting of these merely cumulative items. *All items which are not merely cumulative, are merely impeaching.* The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a discharged employee of Goldstein, Green, a disbarred law-

yer, and Sampson, who makes an affidavit filed December 4, 1944. All of the defendants have known, or are charged with knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941—two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related by Fowler since at least as early as September, 1942, more than one year before it was presented. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. Sampson's alleged impeaching evidence is not in fact impeaching and furthermore is denied by Goldstein. *The court does not believe that Goldstein recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circumspect.* The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person re-

ferred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. *Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal.* The court concludes that the amended motion for a new trial on the ground of newly discovered evidence should be denied. [Italics supplied.]

SUMMARY OF ARGUMENT

The judgments of the court below granting respondents' amended motion for a new trial and reversing the trial court's order denying the motion resulted from the conclusion of the majority below that William Goldstein, a Government witness, testified falsely at respondents' trial. This conclusion in turn resulted from a misapprehension of the significance of the material presented and from the majority's action in weighing the motion evidence, in rejecting evidence supporting the trial court's conclusion that Goldstein did not testify falsely at the trial, and in substituting its own judgment as to the weight of the evidence for that of the trial judge. The majority plainly erred in granting respondents' motion on the basis of such a review. It is well settled that an appellate court has authority to

review the denial of a motion for a new trial only for abuse of discretion, and this rule applies to a motion based on allegedly newly discovered evidence. Review for abuse of discretion in respect of factual questions means a review to determine whether the trial court's factual finding is unreasonable, arbitrary or capricious, not a review to determine whether the appellate court's conclusion would be the same as the trial court's had the appellate court been the triers of the facts. An appellate court may review only for error of law resulting from a lack of evidence to support the trial court's factual finding, not for error of fact as to the weight of the evidence. This Court has repeatedly held that a motion for a new trial based on an alleged error of fact is not reviewable.

In granting respondents' motion the majority below also applied the wrong test for the resolution of the merits of a motion for a new trial based on allegedly newly discovered evidence. The test applied by the majority is one which has found proper application in cases of recantation. Here there not only was no recantation but, on the contrary, vigorous reassertion of the witness' trial testimony. Moreover, the recantation test is one to be applied initially by the trial court, not the appellate court. Assuming that it may be extended to a case where there has been a clear and convincing showing of perjury, as distinguished from a recantation, this is not such

a case. Respondents' motion has been based on the erroneous assumption that Goldstein must be considered to have testified to a conclusion which the jury may or may not have inferred from all of the Government's evidence offered in support of the disputed expenditure items. Very little of the motion evidence has any relation to the question whether Goldstein's actual testimony was false. The little evidence which may be classified as impeaching is itself lacking in credibility. The trial court has found that Goldstein did not testify falsely at respondents' trial and this finding, we submit, clearly is not unreasonable, arbitrary or capricious. Accordingly, it was the duty of the court below to accept the finding and to review further for abuse of discretion on the basis of the well settled rule that a motion for a new trial based on allegedly newly discovered evidence will not be granted for cumulative evidence, rarely for impeaching evidence and not at all if the impeaching evidence is not such as would probably produce an acquittal upon a new trial.

The trial judge's finding that Goldstein did not testify falsely at respondents' trial, being a reasonable one, is dispositive of the only ground raised by respondents for the granting of their motion. However, the trial judge also found that the impeaching evidence, if it may even be called that, is not such as would probably produce an acquittal upon a new trial and this

finding is the final, conclusive answer to the merits of respondents' motion. The finding is eminently reasonable, for the so-called impeaching evidence, designed to impeach Goldstein's credibility, presents its own problems of credibility and the jury has already returned verdicts of guilt with as much reason for not believing Goldstein as is presented by respondents' motion evidence. Moreover, Goldstein's testimony was not a necessary part of the Government's case. Respondents' convictions may have been based on the "ownership" theory of proof alone, on which Goldstein's testimony had little bearing, and the "expenditure" theory of proof reinforces the conclusion that Johnson had large unreported income even without Goldstein's testimony. The expenditure charges on Bon Air, mostly for improvements, were the only ones which would change the total of the excess of Johnson's expenditures over his available declared cash resources in any comparatively substantial amount, and the propriety of these expenditure charges was supported by a great deal of proof other than Goldstein's testimony, including respondent Johnson's own prior admissions.

Since nothing of any consequence was added on respondents' amended motion, effect should, we submit, be given to the opinion of the court below on review of respondents' first motion, when the court, on a proper review, concluded that the trial court's finding that Goldstein did not testify

falsely at the trial was not unreasonable, arbitrary or capricious and that the trial judge did not abuse his discretion in denying respondents' motion. The majority decision below is merely an expression of the majority's own views as to the weight of the motion evidence.

ARGUMENT

I

THE MAJORITY OPINION BELOW IMPROPERLY REJECTS THE TRIAL COURT'S CONCLUSIONS AND SUBSTITUTES THE MAJORITY'S OWN CONCLUSIONS AS TO THE WEIGHT OF THE MOTION EVIDENCE INSTEAD OF DETERMINING WHETHER THE TRIAL COURT'S FACTUAL CONCLUSIONS ARE UNREASONABLE, ARBITRARY, OR CAPRICIOUS

While early decisions of this Court hold that the denial of a motion for a new trial is not reviewable by an appellate court except to determine whether the trial court has erroneously excluded from consideration matters which were appropriate to a decision on the motion (*Clyde Mattox* v. *United States*, 146 U. S. 140, 147; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303), those decisions appear to apply only when it is alleged that the trial court committed an error of fact (see *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247). The Court has held that a motion for a new trial based on

what would amount to prejudicial error of law will be reviewed for clear abuse of discretion (*United States* v. *Socony-Vacuum Oil Co., supra; Glasser* v. *United States*, 315 U. S. 60, 87) and the Circuit Courts of Appeals have consistently held or assumed that the abuse of discretion rule also applies in the case of a motion based on newly discovered evidence.[28] We therefore assume that the Circuit Courts of Appeals have that limited power of review in cases such as the instant one, as the court below specifically held in its first opinion on appeal from the denial of respondents' motion.

At the outset, it should be noted that the first, unanimous opinion of the Circuit Court of Appeals, in which the trial court's first denial of respondents' motion was affirmed, and the majority opinion below, in which respondents were granted a new

[28] See, e. g., *Long* v. *United States*, 139 F. 2d 652 (C. C. A. 10th); *Roberts* v. *United States*, 137 F. 2d 412 (C. C. A. 4th), certiorari denied, 320 U. S. 768; *Glover* v. *United States*, 125 F. 2d 291, 293 (C. C. A. 5th), certiorari denied, 316 U. S. 690; *Weiss* v. *United States*, 120 F. 2d 472, 475, 122 F. 2d 675 (C. C. A. 5th), certiorari denied, 314 U. S. 687; *Slappey* v. *United States*, 110 F. 2d 528 (C. C. A. 5th); *Goodman* v. *United States*, 97 F. 2d 197, 199 (C. C. A. 3d), certiorari dismissed, 305 U. S. 578; *Prisament* v. *United States*, 96 F. 2d 865 (C. C. A. 5th); *Hale* v. *United States*, 67 F. 2d 673, 674 (C. C. A. 6th); *Lancaster* v. *United States*, 39 F. 2d 30, 33 (C. C. A. 5th); *Brown* v. *United States*, 32 F. 2d 953, 954 (App. D. C.); *Casey* v. *United States*, 20 F. 2d 752 (C. C. A. 9th); *Camp* v. *United States*, 16 F. 2d 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754.

trial on appeal from the trial court's second denial of respondents' motion, are decisions based on practically identical motion evidence. The additional evidence relied upon by respondents on their second, amended motion consists primarily of the income tax returns filed by Theodore Goldstein on the rentals from the Albany Park Bank Building, returns which were filed upon the insistence of the revenue agents that he was liable for tax on the rentals because he was the record title holder of the building. (*Supra,* pp. 45–46.) It was the filing of these returns which resulted in remand of the case on the eve of decision by this Court on respondents' petition for certiorari (Nos. 153 and 154, 1944 Term) to review the first judgment of the Circuit Court of Appeals affirming the trial court's denial of their motion. The returns, taken together with the circumstances surrounding their preparation, merely show what was testified to by Goldstein at the trial and was never in dispute—that the record title to the Albany Park Bank Building is in the name of his son. While respondents took advantage of the remand to file two affidavits, neither of the affidavits is of any consequence. One is designed merely to corroborate their affiant Fowler and does not have that effect (see Note 11, *supra,* p. 42); the other is for the most part concerned with the leasing of the Albany Park Bank Building, a mat-

ter on which respondents had submitted evidence on their original motion. As Judge Minton stated in his dissenting opinion on appeal from the denial of respondents' second, amended motion (AR. 235):

> The additional evidence adduced in support of the amended motion adds nothing to the proof that was submitted to us on the original motion * * *.

The principal question raised by the majority opinion below as to the scope of review for abuse of discretion concerns the scope of review in respect of factual questions, the result reached by the majority being based primarily, if not wholly, on their factual conclusion that Goldstein testified falsely at respondents' trial. A trial judge can also abuse his discretion by failing to consider matters which are pertinent to a decision on the motion (*Clyde Mattox* v. *United States, supra*) or by the misapplication of erroneous legal criteria. It can hardly be contended, however, that the present case involves an improper exclusion on the part of the trial judge, for he considered respondents' motion evidence exhaustively and, as the court below stated in its first opinion, "with painstaking effort and meticulous care." (R. 583.) While the majority opinion below in effect holds that the trial judge applied the wrong test in passing on respondents' motion, that holding resulted from the majority's

factual conclusion that Goldstein testified falsely at the trial.

In the first, unanimous opinion of the Circuit Court of Appeals on review of respondents' motion the court stated that in the light of the whole record it could not say that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein testified falsely at the trial and that it could not say that, as a matter of law, the trial court had erred in its finding in that connection (R. 584); it was therefore held that the trial court did not reach its conclusions arbitrarily or capriciously and, as a matter of fact and law, had not abused its discretion in denying the motion (R. 585). In explaining the scope of review for abuse of discretion, the court stated (R. 582):

> *Certainly we do not have the right to consider the record for the purpose of arriving at an independent finding and judgment of our own which we may substitute for that of the trial judge. We do not sit to try the case de novo.* We are to review, as always, for errors of law, which review includes a review of the trial court's action for the purpose of determining whether or not it abused its discretion in reaching the conclusion it did. *Pemberton* v. *United States,* 76 F. 2d 596. In determining whether or not the trial court abused its discretion, we consider not only the things which it considered as exhibited

> by the record in this Court, but we consider also whether it improperly excluded from its consideration anything that should have been considered. *Mattox* v. *United States*, 146 U. S. 140. * * * After such a review and consideration, *we do not have the right, where there are no improper exclusions, to substitute our findings or judgment for that of the trial court. We determine by the record only whether the trial judge might reasonably have reached the conclusion which he did.* [Italics supplied.]

In the court's second opinion on review of respondents' motion, the majority, who also sat on the previous appeal, state that "We now think that we accorded" the abuse of discretion rule "a more strict application than the circumstances justified." (AR. 227.) Pursuant to that conclusion, the majority frankly abandon any attempt to determine whether the trial court's factual conclusions are reasonable; substitute their own factual conclusions from the record evidence for those of the trial court; and do this without, as it appears, a thorough knowledge or consideration, as the case may be, of the fundamental facts reflected by the trial record and, in some respects, of the motion evidence. The majority state that, since they have considered only the affidavits of persons who did not testify at the trial and were not subpoenaed (except Peacock) in reaching their conclusion that Goldstein

testified falsely at the trial, "it would appear that we are in as good a position to evaluate the testimony as the trial court." (AR. 226.) In line with this position, the majority state that the affidavits of Goldstein, submitted in opposition to respondents' motions, "carry little, if any, weight" (AR. 225) even though the trial court "saw and heard Goldstein at the trial" (AR. 227), that it is their "considered judgment" that Goldstein testified falsely at the trial (AR. 225), and that they have "reached the conclusion" that he testified falsely (AR. 226). That the majority reviewed the case *de novo* is only too apparent from the manner in which, throughout their consideration of the motion evidence (AR. 210–225), they ignore the evidence supporting the trial court's conclusions as to particular evidence, reject the trial court's conclusions with respect to it, and state their own conclusions, which in many important instances are contrary to the facts disclosed by the record.[29] Nowhere in their opinion

[29] The following are examples:

Hess affidavit.—"We do not think the testimony of Hess is capable of such construction. * * * we have a direct issue between Hess, a reputable member of the Bar, and Goldstein. Any kind of logic or reason of which we are aware requires the acceptance of Hess' version as true and that of Goldstein as false." (AR. 213.) The majority were under a misapprehension as to what "Hess' version" was. See *supra*, pp. 35–36.

Green affidavit.—"* * * no reason appears on the face of the record as to why he [Goldstein] should be believed in

do the majority state that the trial court's conclusions are unreasonable, arbitrary or capricious.

It would seem too clear for argument that an appellate court has no authority to substitute its

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preference to Green." (AR. 212.) A very adequate reason appears. See *supra*, pp. 40–41.

Government's affidavits regarding filing of income tax returns by Theodore Goldstein on rentals from Albany Park Bank Building.—"These affidavits as to the 'circumstances' are more illuminating for what they omit than for what they contain." (AR. 218.) "We think the 'circumstances' destroy themselves * * *." (AR. 219.)

Trial court's conclusion that leasing of Albany Park Bank Building in name of record title holder is not inconsistent with Goldstein's testimony.—"We do not agree with such reasoning. We think this circumstance alone, unexplained as it is, comes close to establishing the falsity of Goldstein's trial testimony." (AR. 220.) The explanation, a simple one, is that the trial evidence showed that Goldstein has been acting as agent for the building. See *supra*, p. 28. This same reason explains many other queries of the majority below.

Majority's disbelief of truth of Wodrick's second affidavit, in which he explains a statement made in his previous question and answer affidavit. (AR. 218.) (See *supra*, p. 48.)

"* * * we see no basis for a finding other than that his [Blockus'] testimony was true and that of Goldstein false." (AR. 214.) For the basis of a contrary finding, see *supra*, pp. 51–52.

"Taking all of these things together [the majority's conclusions as to the evidence regarding the Albany Park Bank Building], we have a strong and abiding conviction that Goldstein's testimony concerning the Albany Park Bank Building was false." (AR. 220–221.)

Marsh and Peacock affidavits.—"They furnish strong circumstantial proof of the falsity of Goldstein's testimony * * *." (AR. 225.) As the trial court noted, the evidence adduced through them was cumulative on the issue of ownership of Bon Air. See *supra*, pp. 59–60.

own conclusions as to the weight of the evidence for those of the trial court. See, e. g., *United States* v. *Alger*, 68 F. 2d 592, 593 (C. C. A. 9th); *Detroit City Gas Co.* v. *Syme*, 109 F. 2d 366, 368 (C. C. A. 6th); *Fine* v. *United States*, 55 F. 2d 9 (C. C. A. 7th). Judicial opinion as to the weight of evidence is not synonymous with abuse of judicial discretion. See *Day* v. *Donohue*, 62 N. J. L. 380 (1898); *People* v. *N. Y. C. R. R. Co.*, 29 N. Y. 418, 431 (1864). Abuse of discretion consists of arbitrary action[30]—action which is unreasonable, against logic and for which there is no justification in the facts or inferences to be drawn therefrom.[31] Thus, as respondents have urged (see R. 582) and as the court below held in its first opinion on review of respondents' motion, the appellate court's function, in respect

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[30] *Home Owners' Loan Corp.* v. *Huffman*, 134 F. 2d 314, 317 (C. C. A. 8th); *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 95 F. 2d 414, 417 (C. C. A. 8th); *Sulzbacher* v. *Continental Casualty Co.*, 88 F. 2d 122, 125 (C. C. A. 8th); *McDonough* v. *Goodcell*, 13 Cal. (2d) 741, 748–749 (1939); *State ex rel. Nielsen* v. *Superior Court*, 7 Wash. (2d) 562, 566–567 (1941).

[31] *Webber* v. *Webber*, 157 Minn. 422, 427 (1923); *Root* v. *Bingham*, 26 S. D. 118 (1910); *Murray* v. *Buell and others*, 74 Wis. 14, 19 (1889); *Manufacturers Ass'n* v. *Exhibitors*, 268 Mich. 685, 689 (1934); *Quinn* v. *State*, 54 Okla. Cr. 179, 185 (1932); *Michaels* v. *Moritz*, 131 Pa. Super. Ct. 426, 427 (1938); *Grant* v. *Michaels*, 93 Mont. 452, 459–460 (1933); *Mielcuszny et ux.* v. *Rosol*, 317 Pa. 91, 93–94 (1934); *Williams* v. *Parsons*, 79 Kan. 202, 207 (1908); *State* v. *Draper*, 83 Utah 115, 143 (1933); *State* v. *Ferranto*, 112 Ohio St. 667, 677 (1925); *Kinnear* v. *Dennis*, 97 Okla. 206, 207 (1924).

of factual issues, is to determine whether the trial court's conclusions from the evidence are unreasonable, arbitrary or capricious. In exercising that function, the appellate court must of course consider and in a sense weigh the evidence, but its consideration of the evidence must be directed toward a determination of whether there is any justification or basis in reason for the trial court's conclusions. If there is justification or a basis in reason for the trial court's conclusions, it is the duty of the appellate court to accept the trial court's conclusions, not weigh the evidence to determine whether its own conclusions agree with those of the trial court, as Judge Minton reiterates in his dissent from the second opinion.[32] A review *de novo* like that of the majority

[32] Judge Minton states (AR. 230–231):

"I am unable to agree with the majority opinion because I think it clearly invades the province of the trial court. We do not sit here to pass upon the facts upon this motion. That is for the trial court. We sit only to review the trial court's action, and to determine whether or not the trial court abused its discretion.

"In reaching this determination, we do not dispute with the trial court on the conclusions it reached on the facts. We determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not whether we on those facts, might have reached a different conclusion. If the trial court reached a conclusion while [*sic*] it might reasonably have reached, and excluded nothing from its consideration which it ought to have considered, it has not abused its discretion. That is the only question we have to determine. I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion."

below invades the province of, and nullifies the discretion vested in, the trial court. As in the case of the review of a factual determination of an administrative agency, of the sufficiency of the evidence to support a verdict, or of the factual findings of a trial court in a civil case, the appellate court reviews for error of law resulting from a lack of support for the finding of the triers of fact, not for error of fact as to the weight of the evidence. As this Court has consistently and repeatedly held, the denial of a motion for a new trial is not reviewable for error of fact. *United States* v. *Socony-Vacuum Oil Co., supra,* p. 247; *Fairmount Glass Works* v. *Coal Co., supra,* p. 481, and decisions there cited.

Contrary to the opinion of the majority below (AR. 227), the scope of review is not enlarged simply because some of the evidence under consideration may consist of affidavits or documents. In the case of the granting or denial of a motion for a new trial based on newly discovered evidence, the trial judge must be accorded a broad latitude in the exercise of his discretion. On such a motion, the motion evidence, written or oral, must be considered with relation to its effect on the trial already had and on a possible new trial. Manifestly, the trial judge is the one most competent to determine that effect. He alone has a true perspective of the case and of the relationship and significance of the trial evidence, as well as a thorough

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knowledge of the trial evidence. The majority opinion below, which indicates a misunderstanding of the factual issues and a lack of familiarity with the trial testimony, illustrates the importance of the trial court's background. In the instant case the trial judge also saw and heard the very witness whose credibility is under attack on respondents' motion, as well as other witnesses whose affidavits were submitted on respondents' motions, notably respondent Johnson.

Hamilton v. *United States*, 140 F. 2d 679 (App. D. C.), relied upon by the majority below, does not support their conclusion that they are entitled to review the denial of respondents' motion *de novo*. In that case, the defendant had been arrested at night and tried and convicted the next morning on the uncorroborated testimony of a police officer. Four days later two uncontroverted affidavits of newly discovered evidence of witnesses were filed. In holding that the language of one of the affidavits had been construed by the trial court with undue narrowness, the Court of Appeals observed that the case was one (pp. 681-682)—

> where the sole evidence to support a conviction is the word of the arresting officer, and where in addition the prosecution without any apparent reason has declined to produce corroborating evidence which the record shows might have been offered. Under such circumstances we think it was

an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut.

II

THE TRIAL COURT APPLIED THE PROPER LEGAL CRITERIA IN PASING ON RESPONDENTS' MOTION

In passing on respondents' motion, the trial court considered itself bound by the well established rule,[33] succinctly stated in *Berry* v. *State of Georgia*, 10 Ga. 511, that a new trial will not be granted if the only object of the evidence adduced on a motion for a new trial is to impeach the character or credit of a witness and that it is incumbent upon the party who asks for a new trial on the ground of newly discovered evidence to satisfy the court that the evidence has come to his knowledge since the trial, that it was not owing to a want of diligence that it did not come sooner, that the evidence is not cumulative of evidence produced at the trial, and that it is so

[33] See, e. g., *Weiss* v. *United States*, 122 F. 2d 675, 691 (C. C. A. 5th), certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 716; *Wagner* v. *United States*, 118 F. 2d 801 (C. C. A. 9th), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713; *Evans* v. *United States*, 122 F. 2d 461 (C. C. A. 10th), certiorari denied, 314 U. S. 698; *Long* v. *United States*, 139 F. 2d 652, 654 (C. C. A. 10th); *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. C. A. 8th); *Prisament* v. *United States*, 96 F. 2d 865 (C. C. A. 5th); *Baird* v. *United States*, 279 Fed. 509 (C. C. A. 6th).

material that it would probably produce a different verdict if a new trial were granted. In conformity with this test, the trial judge both times denied respondents' motion because of his conclusions that Goldstein did not recant and did not testify falsely at the trial, that all of the respondents' motion evidence which was not merely cumulative was merely impeaching, that the allegedly newly discovered evidence is not such or of such a nature as on a new trial would probably produce an acquittal, and that respondents had not been diligent in presenting their cumulative evidence. (R. 514–515; *supra*, pp. 61–63.) In its first opinion, the Circuit Court of Appeals held that the trial court applied the correct test, stating that the test "has been followed in the Federal cases and is of almost universal application among the States." (R. 584–585.) The court at the same time rejected respondents' contentions that the so-called rule of *Larrison* v. *United States*, 24 F. 2d 82 (C. C. A. 7th), applied, stating that in that case and others cited for the same rule "the court was discussing the rule where there had been a recantation or where it had been proved that false testimony had been given on the former trial" and that this is not such a case. (R. 583.) In contrast, the majority, on the second review of the trial court's action, state that the rule of the *Berry* case, stated above, was applied in their first opinion on the premise that there had been no showing of the falsity of Goldstein's testimony

(AR. 227–228), that the majority "now have disapproved of the finding of the lower court relative to the falsity of Goldstein's testimony" and "concluded that Goldstein's testimony was false" (AR. 228), and, accordingly, that the rule of the *Larrison* case, *supra*, is applicable. That rule was stated in the *Larrison* case to be that a new trial should be granted when (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it the jury might have reached a different conclusion; and (c) that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. Having determined that this rule is applicable here because of their conclusion that Goldstein's testimony was false, the majority state that "We think we need not labor the point that the jury might have reached a different conclusion without it" (AR. 228) and that "we think it may be taken for granted that the defendant Johnson knew of the falsity of Goldstein's testimony at the time it was given and likewise that he was unable to meet it" (AR. 229).

The so-called rule of the *Larrison* case is one which has properly found application in cases of recantation by a witness. All the federal cases cited by the majority in support of its position were addressed to that situation. In *Pettine* v.

Territory of New Mexico, 201 Fed. 489 (C. C. A. 8th), an important witness recanted and asserted that he had been intoxicated at the time of his trial testimony. In *Martin* v. *United States*, 17 F. 2d 973 (C. C. A. 5th), the court referred in dictum to the rule applicable where a witness admits that he testified falsely or that he was mistaken. In the *Larrison* case itself, a prior decision of the court below, the court denied remand for the purpose of passing on a motion for a new trial but stated the requisites for a new trial in the case of recantation. The case involved a recantation followed by a repudiation thereof and it was for that reason that the rule was stated to apply where the court is "reasonably well satisfied that the testimony given by a material witness is false." (AR. 228.) [34]

In holding the so-called rule of the *Larrison* case applicable here, the majority below have extended that rule to a case where there has been no recantation but, on the contrary, vigorous reassertion of the witness's trial testimony. We should have no quarrel with an extension of that rule to a case where there has been a clear and

[34] In *State* v. *Mounkes*, 91 Kan. 653 (1914), the final case cited by the majority below, testimony given by a Government witness a few minutes before the close of the case was later shown by conclusive evidence to be false. The fact drawn in issue was whether a school yard contained a flower bed surrounded by stones. The evidence brought forward after the trial showing the existence of that physical fact, by photographs and otherwise, was beyond dispute.

convincing showing of perjury, found by the trial court. Here, however, the extension of the rule by the majority below is made by virtue of a departure from established practice, the majority having undertaken a *de novo* review of the motion evidence presented to the trial court. The requirements of the so-called rule are factual and, as we have shown, the trial court's finding that Goldstein did not testify falsely must be accepted by the appellate court if that finding is not unreasonable, arbitrary or capricious. As we shall show, the trial court's conclusion is not unreasonable, arbitrary or capricious; indeed, there is no warrant in the record for a finding that Goldstein did testify falsely. This necessarily means that the so-called rule of the *Larrison* case is not applicable here and that, as the trial court found, the motion evidence which is not merely cumulative is merely impeaching, in that it is evidence which might furnish the basis for attacking Goldstein's credibility on cross-examination at a second trial. Under such circumstances, the only true test for resolving the merits of respondents' motion is to determine whether the impeaching evidence would probably result in an acquittal upon a new trial, assuming that impeaching evidence may be a ground for a new trial in an exceptional case (see *infra,* p. 110). This is not to say that the trial already had must be ignored. On the contrary, a determination of the probable

effect of respondents' impeaching evidence on a new trial must necessarily be made with reference to the result reached at the trial already had, during which, among other things, the credibility of Goldstein's testimony was vigorously attacked and was squarely in issue.

III

THE TRIAL JUDGE'S FINDING THAT GOLDSTEIN DID NOT TESTIFY FALSELY AT RESPONDENTS' TRIAL IS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS

A. *Respondents' erroneous conception of Goldstein's testimony*

Respondents' contention that Goldstein testified falsely at their trial is based upon a misconception of the scope of Goldstein's testimony. They conceive Goldstein to have testified that respondent Johnson was the sole owner of the Bon Air properties, Albany Park Bank Building, The Dells, and the property at 9730 So. Western Avenue. (See, e. g., Respondents' Brief in Opposition, Nos. 115, 116, present term, pp. 17–18.) As we have shown in the Statement (*supra*, pp. 12–16) and as a reading of Goldstein's testimony (Appendix A, *infra*, pp. 118–137) reveals, his testimony, so far as it is subject to attack as being false, was merely that Johnson gave him the money and requested him to purchase these properties and to make the two escrow deposits on unconsummated sales. In the petition for certiorari which

respondents filed last term (Nos. 153 and 154, October Term, 1944, pp. 28–31), they frankly argued that the falsity of Goldstein's testimony must be resolved by determining whether its "import" was false and, in accordance with their conception of its "import," that Goldstein must be considered to have testified that Johnson was the sole owner of the properties.[35] They urged, as a reason for this position, what they have consistently stated throughout the proceedings on their motion and even prior thereto—that Goldstein's testimony was the *sole* proof offered by the Government at the trial in support of enormous expenditures charged to Johnson under the expenditure theory of proof. (See, e. g., Brief for William R. Johnson on Re-Argument, Nos. 4 and 5, 1942 Term, p. 76; Motion for a New Trial, R. 14; Petition for Certiorari, Nos. 153 and 154,

[35] In line with their contention, respondents stated in their brief in opposition in the instant case (Nos. 115, 116, October Term, 1945, pp. 17–18) that "Goldstein made a misstep * * * when he testified as to the Albany Park Bank Building" that "'I was requested by Mr. Johnson to go out there and purchase the building *for him*.'" [Italics supplied by respondents.] We readily concede that Goldstein's testimony as to all of the properties can be construed to mean that he purchased the properties for Johnson in the sense that it was Johnson who requested him to make the purchases. But in limiting his testimony to statements as to who furnished the money and requested him to make the purchases, Goldstein obviously expressed no opinion as to who became the owner or owners of the properties after their purchase. Especially is this true in the light of his testimony on cross-examination. (See *supra*, p. 14.)

October Term, 1944, pp. 8–9, 29.) On this premise, now accepted by the majority below (AR. 228), respondents have asserted that our position—that the issue of whether Goldstein testified falsely should be resolved simply by considering the motion evidence in relation to his trial testimony—"betrays" a "callous indifference to fair administration of justice" and demonstrates that "by the adoption of inconsistent positions" the Government "seeks to benefit by the misapprehension of the evidence" by the jury and courts and at the same time deprive respondents of a new trial "based on newly discovered evidence addressed to the *received import* of the perjured testimony." [Italics supplied.] (Petition for Certiorari, *id.*, pp. 28–29.) The acceptance of this claim that Goldstein must be deemed to have testified that Johnson was the sole owner of the properties was one of the reasons for the result reached by the majority below.[36]

The trial judge, on the other hand, noted that (R. 464):

> While it is claimed in the defendants' brief that Goldstein committed wilful per-

[36] The majority below state (AR. 211):

"In our opinion, the government makes an ill advised attempt to escape defendants' contention that Goldstein testified that Johnson was the owner of the properties in question but embraced nothing more than the bare fact that in the purchase of the various properties involved the money for such purchases was received from Johnson. Especially is this true in light of the fact that the cornerstone of the

> jury on the trial, the defendants have refrained from quoting the exact testimony of Goldstein and from calling attention to its limited scope. Instead, the defendants have characterized this testimony and have generalized in respect of it in such a manner that one not acquainted with the actual testimony given might be misled into attributing to Goldstein testimony never uttered. Thus, by assertion and generalization of defendants, it is made to appear that Goldstein testified not only that Johnson was the owner of certain properties but that he was the sole and only owner thereof. Throughout defendants' brief this assertion is reiterated. * * *

There is no basis whatever for the position that Goldstein must be considered to have testified that Johnson was the sole owner of these properties.

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government's case was that Johnson was the owner. Based largely on Goldstein's testimony, the government has succeeded in convincing the jury and court after court that such was the case."

At another point (AR. 225), it is stated with respect to what the majority term "the most remarkable disclosure in this record" (AR. 224):

"If these two witnesses [Marsh and Peacock] have spoken the truth, which there is no reason to doubt, they furnish convincing proof of the truth of Johnson's trial testimony that he was the owner of only one-half interest in Bon Air, as well as some of the other properties involved. If true, they just as conclusively shatter the foundation upon which this prosecution has been constructed. They furnish strong circumstantial proof of the falsity of Goldstein's testimony and demolish the implication which was drawn therefrom and used by the government to such good advantage."

Moreover, Goldstein's testimony was *not* the *sole* proof offered by the Government at the trial in support of enormous expenditures charged to Johnson on the assumption that he was the sole owner of the properties. The largest and by far the most significant of the disputed expenditures charged to Johnson were the amounts for *improvements* on the Bon Air country club over and above what Johnson admitted spending and, as we have shown in the Statement (*supra*, pp. 30–32), those expenditure charges were made on the basis of a great deal more evidence than Goldstein's testimony that Johnson gave him the money and requested him to purchase the Bon Air country club property. The alleged "inconsistent positions" asserted to have been taken by the Government refer to (1) our position in connection with the sufficiency of the evidence to support respondents' convictions, that Goldstein's testimony was evidence which the jury might properly consider in connection with the question whether Johnson had made the expenditures charged to him by the Government on the properties in question, and (2) our position on respondents' motion, that Goldstein's testimony was not shown to be false unless what he testified to was shown to be false. We fail to see any inconsistency in these positions. Even if Goldstein's testimony had been the sole basis for charging Johnson with enormous expenditures, there would be no warrant for determining the issue of the falsity of his testimony

on the basis of what the jury may or may not have inferred from it.

In taking the obviously correct position that Goldstein cannot be held to have testified falsely to something he did not testify to at all, we have not urged that the "import" or effect of his testimony was to be ignored by the trial court, only that it was to be considered separately. The so-called rule of the *Larrison* case, *supra,* upon which respondents have relied, itself requires separate consideration of the issues of falsity and effect. (See *supra,* pp. 80–83.) In our brief in the trial court we specifically stated that "it is clear that the Court [trial court] must consider and evaluate the new evidence to determine what its possible effect might have been upon the jury" (R. 311–312), citing the *Larrison* case, *supra.* We took the position, of course, that the well established rule already stated (pp. 79–80), not the so-called *Larrison* rule, was applicable to the case (see R. 280–281, 306, 311–313), but in applying that well established rule the trial judge necessarily considered the "import" and effect of Goldstein's testimony in conjunction with the effect of respondents' impeaching evidence when he found that "the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal" (AR. 168). The "import" and effect of Goldstein's testimony is considered at pages 112–116 in

connection with the appropriateness of that finding of the trial judge.

B. *Discussion of trial judge's finding*

Both times he denied respondents' motion, the trial judge stated (R. 515; AR. 168):

> The court does not believe that Goldstein has recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circumspect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. * * *

If the trial judge's conclusion that Goldstein did not testify falsely is a reasonable one, it would seem effectively to dispose of the only ground on which respondents have relied for the granting of their motion. However, impeaching evidence may apparently be a ground for a new trial in an exceptional case if it is such that it would probably produce an acquittal. Accordingly, the impeaching evidence will, as we have stated, also be considered in that connection later.

Before considering the impeaching evidence, it should be noted that in its first, unanimous opinion the court below, on a proper review, concluded, after a careful consideration of the record, that the trial judge's conclusion that Goldstein did not testify falsely at the trial was not unreasonable, arbitrary or capricious. The opinion of the majority below on the second appeal merely reflects the majority's own views of the motion evidence. In the circumstances, the finding of the trial court on a factual issue should, we submit, be given effect. *Delaney* v. *United States*, 263 U. S. 586, 589–590; *United States* v. *Johnson*, 319 U. S. 503, 518. At least, in view of the misapprehension of the facts which the majority display in their opinion, it should be particularly significant that Judge Minton who wrote the first opinion, in which the court stated it had "carefully considered the record" (R. 583), dissented from the second opinion of the court, stating (AR. 231):

> I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion.

The majority below make much of the fact that Goldstein had a motive for testifying falsely. (AR. 210, 225.) The same could be said for a number of the "obviously unwilling" witnesses (319 U. S. at 516) whom the Government was compelled to call at the trial. Since respondents will no doubt also rely upon Goldstein's alleged motive,

we should perhaps mention that since Goldstein was already under indictment for perjury in another connection he had just as much motive for testifying truthfully; that his alleged motive—the protection of Skidmore—had no relation to the result, for Skidmore was later convicted for income tax evasion; and that any implications to be drawn from Goldstein's possible motive for testifying falsely are dissipated by the fact that the jury was aware that Goldstein was under indictment for perjury and that the instant indictment had been dismissed as to both Goldstein and Skidmore.

It should be noted that only a portion of Goldstein's testimony is subject to attack as being false. As we have shown in the Statement (*supra*, p. 16), respondent Johnson himself admitted the truth of Goldstein's entire testimony with respect to the purchase for more than $150,000 of the Sunny Acres Farm and adjoining DuPage County real estate, conceding full ownership of those properties. Moreover, in addition to that part of Goldstein's testimony which was corroborated by the escrow papers in evidence, his testimony that he made the purchases and escrow deposits with currency and that quitclaim deeds to the properties were delivered to Johnson was incontrovertibly corroborated by other evidence. This leaves only his testimony that Johnson gave him the money and requested him to purchase the Bon Air property, the Albany Park Bank Build-

ing, The Dells, and the property at 9730 So. Western Avenue and to make the two escrow deposits on unconsummated sales. Even this testimony has corroboration in the trial record. As the trial judge noted (*supra*, pp. 62–63), Johnson was the one person who habitually used currency instead of bank checks and carried large sums of cash—$10,000 to $15,000—in his pockets. (See, e. g., Nos. 4 and 5, 1942 Term, 3 R. 965.) Perhaps even more significant is Johnson's corroboration of Goldstein's testimony regarding the purchase of the DuPage County real estate adjoining the Sunny Acres farm, for that piece of property was purchased in exactly the same manner as the other properties about which Goldstein testified, namely, with payment in currency, record title taken in the name of Goldstein's nominee and a quitclaim deed subsequently delivered to Johnson. The fact that Johnson admitted ownership of at least a one-half interest in the Bon Air properties, The Dells and the property at 9730 So. Western Avenue made it as likely as not that he had been the one to give Goldstein the money to purchase those properties. Respondents' failure to cross-examine Goldstein regarding the Bon Air properties and the Albany Park Bank building is significant, as is Johnson's own admission, corroborated by the affidavits of Marsh and Peacock submitted on respondent's motion, that Goldstein gave him full title to the Bon Air properties.

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Only a relatively small portion of respondents' motion evidence has any bearing on the question whether Goldstein testified falsely in any respect, even the majority below recognized when they stated that "Much of it, as far as we can ascertain, is immaterial to the issue." (AR. 210.) The immaterial evidence which is not totally irrelevant to the case is to a large extent cumulative of that adduced at the trial on the question whether Johnson was the sole owner of the Bon Air properties. The submission of this evidence on a motion which purports to be based on the ground that Goldstein testified falsely at the trial is consistent with respondents' unwarranted assumption that Goldstein testified that Johnson was the sole owner of these properties, but since cumulative evidence is not ground for a new trial (*infra*, p. 108), is hardly consistent with a conclusion that respondents' motion was made in good faith.

Overlooking the limited nature of Goldstein's testimony and the fact that much of it was incontrovertibly true, respondents submitted the testimony of four affiants designed to indicate that Goldstein had made general recantations. Three of these affiants are Hess (counsel for Johnson's co-defendants at the trial), respondent Johnson and Johnson's brother, whose testimony all relates to the same incident. The testimony of these affiants is discussed in the Statement, *supra*, pp. 35–38. In view of Hess' disclosures to Special Agent Read, the obvious interest of all

three affiants and the fact that the alleged statement by Goldstein was supposed to have been made *more than two years before* the execution of the affidavits, when respondents might certainly be expected to have taken action if Goldstein had recanted, it seems quite obvious that the trial judge could hardly have reached any other conclusion than that the affidavits of these three affiants could not be taken to be evidence that Goldstein committed perjury. This is not a case such as that portrayed in *Hamilton* v. *United States, supra,* discussed above at page 78, where the trial judge unjustifiably construed an ambiguous affidavit too narrowly; it is an instance in which affidavits submitted by the movants for a new trial are misleading and have been explained in their true light by the least interested of the affiants.

Maurice Green, a discharged lawyer working as a bakery salesman, whom Goldstein states he saw very seldom except when Green begged small sums of money from him, unqualified purports to testify to recantation by Goldstein. Green's stories, contained in three different affidavits (R. 100–101, 125–126, 216–217), discussed in the Statement (*supra,* pp. 40–41), are so improbable as to impel the conclusion that they are unworthy of belief. The trial judge's conclusion that Green had discredited himself is manifestly a reasonable one, although the majority below prefer to believe Green in preference to Goldstein by ignor-

ing everything except the fact that Green is a disbarred lawyer, which they state is no reflection on his credibility. However, evidence to warrant a new trial must at least be credible. *Evans* v. *United States*, 122 F. 2d 461 (C. C. A. 10th), certiorari denied, 314 U. S. 698; *Goodman* v. *United States*, 97 F. 2d 197, 199 (C. C. A. 3d).

Since a large part of Goldstein's testimony was incontrovertibly true and Johnson admitted that Goldstein had purchased the DuPage Country real estate for him, as to which title was taken in the name of Goldstein's nominee, the evidence submitted by respondents on the issue of the falsity of Goldstein's testimony can appropriately be considered only from the angle of the showing made as to the falsity of his testimony regarding each property. Except for the affidavits intended to show recantation, just discussed, respondents impeaching evidence, if it may even be called that, relates primarily to the Bon Air properties, the Albany Park Bank Building and the two escrow deposits on unconsummated sales.

Bon Air.—Apart from the foregoing, the only newly discovered evidence submitted by respondents to impeach Goldstein's testimony regarding the purchase of this property is the statement contained in the affidavit of Fowler that Goldstein told him that Skidmore gave him the money to purchase Bon Air. (*Supra*, pp. 41–42.) In fact, this is the only direct evidence on the issue of falsity submitted by respondents as to *any* of the specific properties,

except for the reiterated denials of respondent Johnson, who testified at the trial and contradicted not only Goldstein but almost every other witness with whom he had a conversation or transaction. Since it is indisputable that Fowler was an employee discharged by Goldstein for issuing an unauthorized check and that an injunction suit was brought to restrain Fowler from receiving the fruits of his unauthorized act, the trial judge was plainly justified in disbelieving Fowler's statement on the ground of prejudice. Moreover, Fowler was discredited on another of his statements. (See n. 11, *supra*, p. 42.) Goldstein also denies having made the statement to Fowler and states that Fowler has been unfriendly toward him since his discharge.

Some of the affidavits submitted by respondent, particularly that of Henricksen, who had testified at the notorious Touhy and Banghart trials and described his own active participation in the kidnaping of John Factor, contain hearsay, consisting of alleged statements by Skidmore supposed to indicate that he made the original purchase of some of the Bon Air parcels. None of these hearsay statements can be considered newly discovered evidence, for they were not admissible at the trial already had and would not be admissible upon a new trial. *Donnelly* v. *United States*, 228 U. S. 243; *Boyd* v. *United States*, 30 F. 2d 900, 901 (C. C. A. 9th). The so-called evidence

carries no weight even if it be assumed that it may be considered on the issue of the falsity of Goldstein's testimony. In the first place, some of the alleged statements by Skidmore are patently unreliable because inconsistent with Johnson's own admissions. (See n. 21, *supra,* p. 57.) Secondly, at his own trial for income tax evasion Skidmore was asked when he had purchased his interest in the Bon Air country club and replied, under oath, "I never had any interest in it." (R. 316.) This statement should carry as much weight, if not more, than his other alleged statements relayed to the trial court second hand. Thirdly, there is no apparent reason why Skidmore's alleged statement as to the purchase of some of the Bon Air properties should be believed in preference to the alleged statement of Skidmore testified to by respondents' affiant Sperling, floorman and special guard at Bon Air. Sperling states that in *June 1939* Skidmore gave $50,000 at one time to Garry, cashier at Bon Air, and stated that it was "to be applied against his share *of the cost of the property* and the cost and maintenance of the Club." [Italics supplied.] (*Supra,* p. 43.) If Johnson and Skidmore each owned a one-half interest in Bon Air, as respondents attempted to show at the trial and again now on their motion, and Skidmore was paying for his share in June 1939, it must have been Johnson who gave Goldstein the money to purchase the property in 1937, when the pur-

chase was made. However, the trial judge did not even rely on this revelation by Sperling. He merely stated that "the fact that this is said to have taken place in 1939 throws doubt on the accuracy of the statement." (R. 510.) While the trial judge thus gave respondents the benefit of the doubt, it should be noted that Garry, who is supposed to have received the money from Skidmore, also testified that the incident took place in June 1939, although he says the $50,000 was for the payment of bills. (R. 107.) According to Johnson's trial testimony, he and Skidmore put in only $10,000 to $15,000 at a time for the payment of bills. (Nos. 4 and 5, 1942 Term, 3 R. 965.) Thus, the situation with respect to respondents' hearsay evidence appropriately demonstrates the reason for the rule that hearsay evidence is inadmissible. As this Court stated in *Donnelly* v. *United States, supra*, p. 276:

> * * * "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible.

Albany Park Bank Building.—Despite the admission of Johnson's counsel in his opening state-

ment at the trial that Johnson had either purchased this building himself or as a partner with some one, the failure to correct this statement during the six-weeks trial other than through one of the numerous denials made by Johnson when he testified toward the end of the trial, and the fact that the question of ownership of all the other properties as to which Goldstein testified was whether Johnson was the sole owner or whether he and Skidmore were equal owners, respondents nevertheless now contend that Goldstein himself, or perhaps Goldstein's son Theodore, is the owner of the Albany Park Bank Building. From this they apparently infer that Goldstein testified falsely when he stated that Johnson gave him the money and requested him to purchase the building. We fail to understand how such an inference can be drawn from this evidence.

Concededly, the aura of mystery concerning the ownership of this building is unusual. But this is an unusual case. Respondents' convictions were based on ample proof that Johnson was the proprietor of a string of gambling houses, which, "while ostensibly conducted as separate enterprises by his co-defendants in separate ownership, was in fact a single unified gambling enterprise." (319 U. S. at 516.) The enterprise was an "elaborately concealed illegal business" and reflected a "skilful concealment." (*Id.* at 518.) The same pattern of concealment was followed in respect of

the properties purchased by Goldstein, the purchases being made with currency and record title being taken in the name of one of Goldstein's nominees rather than in the name of the true owner. That Johnson used this type of concealment is indisputable in view of his admission that Goldstein purchased the DuPage County real estate adjoining the Sunny Acres farm for him. The record title to all of these properties apparently remained in the name of Goldstein's nominee for otherwise there would have been no dispute at the trial as to their ownership and Goldstein would not have even been called upon to testify regarding the escrow papers. Title to the Albany Park Bank Building was taken in the name of Goldstein's son Theodore, as in the case of the Bon Air country club, in which Johnson conceded he had a one-half interest. Johnson's counsel admitted in his opening statement that the rents from the building were being collected by an agent and applied to the upkeep of the building. That agent was shown to be Goldstein, for it was he who, like the ostensible owners of Johnson's gambling establishments, became "spokesman" for the building immediately after its purchase. With Johnson now in a position where he would not be expected to reveal his ownership in the building, Goldstein naturally would carry on as agent by leasing the building, collecting the rents and offering to apply them on a state tax lien against the building.

The very fact that a tax lien came into existence after the trial indicates that the true owner can hardly be Goldstein.

We see little reason why Goldstein should be censured for the filing of the income tax returns on the rentals from the building by his son Theodore, since the returns were filed at the insistence of the local representatives of the Bureau of Internal Revenue that, as record title holder, Theodore was liable for tax on the rentals. (See *supra*, pp. 44–46.) Taxes are frequently paid first and contested later and Goldstein no doubt was in any event entitled to deduct the taxes from the rentals he was collecting. While the testimony of the local Bureau representatives discloses, as the trial judge stated (AR. 165–166) a somewhat "extraordinary and remarkable effort" on their part to procure a statement from Goldstein to the effect that his son was "the owner," Goldstein's refusal to sign such a statement reaffirms his trial testimony. There is no warrant for the statement of the majority below that the returns are necessarily false if Theodore is not the actual owner of the building (AR. 219); for Goldstein prepared a statement to accompany the returns which states that his son is the "record title holder" and the returns were filed on the assumption that Theodore was liable for the tax as record title holder, Goldstein having repeatedly told the Treasury representatives that

his son was not the actual owner of the building. Since they insisted that Theodore file the returns and pay tax on the rentals, Goldstein obviously cannot be criticized because Deputy Collector Wodrick, who prepared the returns, allowed deductions for depreciation, etc. on the building. We see no justification for any other conclusion than that the returns and the circumstances surrounding their filing show nothing more than what Goldstein testified to at the trial—that his son Theodore, as in the case of the Bon Air country club, was the record title holder.

Respondents' motion evidence contains two statements which are apparently offered as proof that Goldstein owns the building. Blockus states that in discussions regarding the state tax lien Goldstein said the property was his. As we have shown in the Statement (*supra*, pp. 51–52), little credence can be given Blockus' statement. Sampson who leased the building for a time, asserts that Goldstein told him Johnson "never had any interest in the property and has nothing whatever to do with it." (*Supra*, pp. 50–51.) Since Goldstein denies making this statement and according to Sampson it was supposed to have been made in a discussion regarding a lease option, it seems reasonable to conclude that Goldstein made some sort of statement that was misinterpreted by Sampson, such as that Johnson *had never taken* any interest in the building and *has had* nothing

whatever to do with it. This changes its entire meaning and makes the statement one which was indisputably true, Goldstein having acted as agent since its purchase in 1937. But even if the statement be taken to mean what respondents read into it, it is one that any agent for an undisclosed principal might have made in similar circumstances.

All of these matters obviously relate to the ownership of the building, not to the question whether Goldstein testified falsely in connection with its purchase. Goldstein, or anyone else for that matter, might very well have become the owner of the building at any time subsequent to the purchase of the building in 1937 and Goldstein's testimony still would not be false. We do not mean to suggest that Goldstein did become the owner, but it must be recognized that the question of present ownership has no conclusive bearing on the question whether Goldstein testified falsely when he stated that Johnson gave him the money and requested him to purchase this building. Especially is this true in view of the concealments that surrounded all of Johnson's business transactions. On the issue of falsity, respondents have offered not an iota of proof.

Escrows.—Respondents apparently contend that Goldstein has claimed ownership of two escrow deposits on unconsummated sales, in the amounts of $7,500 and $10,000, and from this apparently conclude that he must have testified falsely when

he stated that Johnson gave him the money for the escrow deposits. As in the case of the Albany Park Bank Building, respondents do not even establish their premise.

From the motion evidence regarding these escrow deposits, set forth in the Statement (*supra*, pp. 53–56), it can readily be seen that Goldstein is not claiming them for himself. He has received the $7,500 deposit because the vendors did not fulfill the terms of the escrow agreement, but having put it up he was the only one who could take it down, no matter to whom it belongs. He states he is holding it subject to the Government's lien against Johnson's property and funds and there is nothing in respondents' evidence which disputes his word on that score.

As to the $10,000 escrow deposit which Goldstein has not received, the only evidence submitted by respondents which tends to support their contention is the testimony of two persons to the effect that, in discussions regarding the withdrawal of the deposit for failure to fulfill the terms of the escrow agreement, Goldstein said the money was his. Goldstein states he does not recall stating the money was his and reiterates that the money was given to him by Johnson "and it is his money." (R. 252.) As against Goldstein's alleged statement that the money was his, respondents themselves reveal the most significant fact that the deposit was made as a result of a trespass suit as to property located between the Bon Air

Country Club and the Curran Farm, properties in which Johnson admits one-half ownership and contends Skidmore owns the other half. Further, Sullivan, attorney for the plaintiffs in the trespass suit, testified that he suggested to Goldstein that there was no lien on the $10,000 deposit and hence it could be applied in settlement of the trespass suit and that Goldstein refused to withdraw or pay over any part of the escrow fund for that purpose unless Sullivan obtained written authority from Johnson.

Thus, in the final analysis the evidence bearing on the question whether Goldstein testified falsely at respondents' trial consists of affidavits by three highly interested persons (Hess and the two Johnsons) which misleadingly reflect a general recantation by Goldstein; an affidavit of general recantation by the untrustworthy Green; one alleged statement by Goldstein testified to by the prejudiced and discredited affiant Fowler; totally unreliable hearsay evidence; a variety of items of cumulative evidence; and inferences which respondents unwarrantedly expect to be drawn from the peculiar position in which Goldstein has been placed with respect to the Albany Park Bank Building and two escrow deposits by reason of the perpetuation by Johnson of his skillful concealment of his affairs. In the Statement we have endeavored to set forth all of the allegedly newly

discovered evidence. The trial court's conclusion that Goldstein did not testify falsely is a reasonable one, especially in view of the trial corroboration of his testimony and the opportunity that the trial judge had to observe Goldstein's demeanor on the stand. It is also not without significance that respondents have been arguing the falsity of the conclusion that Johnson was the sole owner of these properties, not the falsity of Goldstein's actual testimony.

IV

THE TRIAL JUDGE PROPERLY DENIED RESPONDENTS' MOTION ON THE GROUNDS THAT THEIR MOTION EVIDENCE IS MERELY CUMULATIVE OR IMPEACHING AND NOT SUCH AS WOULD PROBABLY PRODUCE ACQUITTALS ON A NEW TRIAL

As we have already shown, respondents' evidence on the question whether Goldstein testified falsely as to his purchase of the Bon Air properties consists only of a few affidavits that were properly discredited. All the rest of the motion evidence relating to the Bon Air properties, set forth in the Statement, has a bearing only on the question of the ultimate ownership of the properties. Since the question whether Johnson was the sole owner or only a one-half owner with Skidmore was directly in issue at the trial on the basis of conflicting evidence (*supra*, pp. 32–34), the motion evidence submitted by respondents to prove that Skidmore had an interest

in Bon Air is merely cumulative of evidence previously adduced. As a comparison of respondents' trial evidence and motion evidence in this connection reveals, most of the motion evidence was of exactly the same nature as that adduced at the trial by respondents. It is well settled that cumulative evidence is not ground for a new trial. *Weiss* v. *United States*, 120 F. 2d 472, 475, 122 F. 2d 675 (C. C. A. 5th), certiorari denied, 314 U. S. 687; *Wagner* v. *United States*, 118 F. 2d 801 (C. C. A. 9th), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713; *Prisament* v. *United States*, 96 F. 2d 865, 866 (C. C. A. 5th); *Mason* v. *United States*, 95 F. 2d 612, 614 (C. C. A. 5th); *Hale* v. *United States*, 67 F. 2d 673, 674 (C. C. A. 6th); *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. C. A. 8th); *Boyd* v. *United States*, 30 F. 2d 900, 901 (C. C. A. 9th); *Camp* v. *United States*, 16 F. 2d 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754; *Gwinn* v. *United States*, 294 Fed. 878, 880 (C. C. A. 5th); *Baird* v. *United States*, 279 Fed. 509, 512 (C. C. A. 6th). The appropriateness of this rule should need no comment other than that there must be an end to litigation sometime, a result, however, which in this case has not yet been achieved after a period of more than five years. Manifestly, these respondents are not entitled to retry the issue of the ownership of the Bon Air properties on the basis of evidence which they had available to them at the trial and failed to

use (*supra,* pp. 58–59) and other evidence which they reasonably could be expected to have obtained during the six-weeks trial. The basis of respondents' motion is supposed to be *newly* discovered evidence and a showing of diligence in respect of it is one of the fundamental requirements on a motion for a new trial. (See *supra,* p. 79.)

The evidence from which respondents conclude that Goldstein is the owner of the Albany Park Bank Building, discussed above, may possibly be classifiable as either cumulative or impeaching, or perhaps both. From an evidentiary standpoint, it plainly does not change the trial picture as to the ownership of this building. That Goldstein was the "spokesman" for the building and his son Theodore the record title holder are facts substantiated by the motion evidence, but they are also facts which were before the jury. There was no intimation at the trial that Goldstein or his son might be the owner of the building, but respondents are hardly in a position to obtain an advantage from whatever inferences in that connection they may draw from the motion evidence. Johnson's counsel in his opening statement accurately described the history of the building and its operation and conceded that Johnson owned the building, having either purchased it himself or as a partner with someone (*supra,* pp. 18–19) and this statement was never corrected during the trial, except insofar as Johnson, when he took the

stand toward the end of the trial, included a denial of ownership of this building among his numerous other denials. While respondents no doubt now regret the concession made at the trial, it was nevertheless one upon which the jury was entitled to rely, unless we are to assume that a new trial may be granted for an error; if such it was, of competent counsel made in the presence of the defendants and not retracted. As the trial court stated (AR 166):

> In the light of that admission made on the trial, it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

Impeaching evidence, as distinguished from cumulative evidence, as a general rule is not ground for a new trial but apparently may be so in an exceptional case. *Slappey* v. *United States,* 110 F. 2d 528 (C. C. A. 5th); *Long* v. *United States,* 139 F. 2d 652 (C. C. A. 10th); *Miller* v. *Commonwealth of Kentucky,* 40 F. 2d 820 (C. C. A. 6th); *Casey* v. *United States, supra; Goodman* v. *United States, supra; United States* v. *Holtz,* 288 Fed. 81 (E. D. N. Y.), affirmed, 293 Fed. 1019 (C. C. A. 2d); *M'Donough* v. *United States,* 299 Fed. 30 (C. C. A. 9th), motion denied, 1 F. 2d 147 (C. C. A. 9th), certiorari denied, 266 U. S. 613. Certainly we should not care to urge that cogent, impeaching evidence which would

plainly result in an acquittal upon a new trial may not be grounds for a new trial. But since respondents' impeaching evidence so clearly presents its own problems of credibility, we see no reason why this case should be an exception to the general rule. New trials for newly discovered evidence are not favored (*Casey* v. *United States, supra,* p. 754) and will be granted with great caution (*Weiss* v. *United States, supra; Long* v. *United States, supra*).

Since respondents are not in any event entitled to a new trial unless their allegedly newly discovered evidence would probably produce an acquittal (*supra,* pp. 79–80), the final, conclusive answer to the merits of their motion is that the trial judge's factual finding that the motion evidence "is not such or of such nature as on a new trial would probably produce an acquittal" (*supra,* p. 63) is a reasonable one. A determination of the reasonableness of the finding must of course be considered with reference to the trial already had.

It should be sufficient that the trial picture as to the credibility of Goldstein's testimony would not be changed by the impeaching evidence respondents submit on their motion. Since Hess would not say that Goldstein had admitted the falsity of his testimony, the effect of any testimony by Hess or the two Johnsons with respect to the conversation referred to in their affidavits, would be at most highly conjectural. Green and

Fowler could, of course, be placed on the stand but cross-examination of them would probably reveal their lack of credibility even more than does the present record. The hearsay evidence would be inadmissible and respondents would not be entitled to attack the credibility of Goldstein's testimony by introducing evidence from which mere inferences in that connection might be drawn. Thus, the situation with respect to Goldstein's credibility would not be materially different from what it was at the trial already had, when, among other things, Johnson made denials and stated that he heard Goldstein "testify to a lot of other things that are not true" (Nos. 4 and 5, 1942 Term, 3 R. 977), and a court witness twice testified (*id.*, 2 R. 73, 87), shortly after Goldstein, that the defendant Wait (who was acquitted) had stated that part of Goldstein's testimony was false. As a matter of fact, respondent Johnson, in his brief on reargument in Nos. 4 and 5, 1942 Term, p. 76, asserted that Goldstein's trial testimony "was shown by cross-examination * * * and otherwise to be wholly unworthy of belief." We do not concur in this conclusion; we merely mention it because it reflects a recognition that the question respondents are raising on their motion for a new trial is one which a jury has already passed upon with as much reason for not believing Goldstein as is contained in respondents' motion evidence.

The question whether the jury did or did not believe Goldstein is of no importance here. As

this Court has stated, the "ownership" theory of proof was alone sufficient to support respondents' convictions. Goldstein's testimony had no bearing on the proof on that theory other than the fact that the Lawrence Avenue Currency Exchange operated by respondent Brown and shown to have been used as a depository for Johnson's gambling house receipts (see our Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 29–30, 55–60, 75–80) was located in the Albany Park Bank Building. It was of only relatively minor significance whether Johnson owned the building or not so far as his use of the currency exchange for that purpose was concerned. We of course cannot assume that the jury convicted respondents on the "ownership" theory of proof alone but, on the other hand, we must necessarily conclude that the jury did not rely on the "expenditure" theory of proof alone either, for the convictions of the respondents other than Johnson were based on the evidence that they "consciously were parties to the concealment of his [Johnson's] interest in these gambling clubs of which they themselves pretended to be proprietors." (319 U. S. at 518.) Accordingly, the jury must have considered the "expenditure" theory of proof only in connection with the question whether Johnson had large unreported income. As this Court has stated, "Of course the government did not have to prove the exact amounts of unreported income by Johnson."

(*Id.* at 517.) It is extremely unlikely that the jury considered the "expenditure" theory of proof other than as supporting the general conclusion that Johnson had large unreported income, regardless of what the amount of it might be. Certainly, since the Government's case was so predominantly based upon the "ownership" theory of proof, it would be incongruous to assume that the jury weighed the evidence as to each expenditure charged to Johnson under the "expenditure" theory of proof. Assuming that they did, however, the jury may not only have disbelieved all of Goldstein's testimony but rejected all of the Government's direct evidence as to Johnson's ownership of Bon Air and still would have been forced to conclude that Johnson's expenditures were nevertheless substantially in excess of his available declared cash resources and that, accordingly, the "expenditure" theory of proof reinforced the "ownership" theory of proof. (See *supra*, p. 12.)

Moreover, even if it be assumed that the jury considered the propriety of each expenditure charge and believed Goldstein, Goldstein's testimony could have had no material effect on the conclusion the jury reached with respect to the propriety of the Bon Air expenditure charges, the only ones which could make any substantial change in the amount of the total excess of Johnson's expenditures over his available declared cash resources. As our statement of the trial evidence offered by the Government in that connection

shows (*supra*, pp. 30–31), these expenditure charges, mostly for improvements, were supported by direct proof that Johnson was the sole owner of Bon Air, proof which included Johnson's own prior admissions and his statements to accountants that he alone had paid for the Bon Air properties and improvements thereon. Respondents, and now the majority below, have simply been in error in assuming that Goldstein's testimony was the sole basis for these expenditure charges. Goldstein did not even testify regarding the ownership of the Bon Air country club. His testimony could hardly have been misconstrued by the jury, for on cross-examination, when he was questioned only regarding The Dells and the property at 9730 So. Western Avenue, he stated that he did not know whether or not Johnson was the sole owner of those properties and, after being shown the deeds to the latter property of a one-half interest to Johnson, concluded that Skidmore owned the other half. (See Appendix A, *infra*, p. 133.) Goldstein's testimony that he purchased the Bon Air country club at Johnson's request with money furnished him by Johnson was direct proof as to Johnson's payment of the purchase price of the property, but on the question of ownership and the large expenditure charges for improvements his testimony was only evidence from which an inference might be drawn in conjunction with the other more direct evidence.

Since Goldstein's testimony was evidence before the jury, we of course included it in our summary of the evidence in our brief on reargument in Nos. 4 and 5, 1942 Term. We did not then and do not now purport to know whether the jury accepted his testimony. Indeed, the jury may have rejected all of the Government's evidence intended to show that Johnson was the sole owner of Bon Air. But assuming that the jury did believe Goldstein, nevertheless, in view of the fact that there was other *direct* proof that Johnson was the sole owner of Bon Air, it is improper to assume, as respondents now do (*supra*, p. 86), that the "received import" of Goldstein's testimony alone was that Johnson was the sole owner of the Bon Air country club. In this connection, it is interesting to note that, when the question of the sufficiency of the evidence to support their convictions was under review by this Court, respondents asserted that Goldstein's testimony "was shown" at the trial to be "wholly unworthy of belief" (*supra*, p. 112), which we presume was intended to mean that his testimony had no weight at all with the jury, and now on their motion for a new trial assert that the "received import" of Goldstein's testimony was that Johnson was the sole owner of these purchased properties and his testimony so material that without it the jury might have reached a different verdict.

We have taken little note of the question of respondents' good faith and diligence in presenting their motions for a new trial. The record should speak for itself in that connection.

CONCLUSION

The judgments of the Circuit Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully submitted.

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NOVEMBER 1945.

APPENDIX A

Nos. 4 and 5—1942 Term

William Goldstein, called as a witness on behalf of the [2 R. 55[1]] Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. HURLEY:

My name is William Goldstein. I live at 415 Aldine Avenue, Chicago. I am a practicing lawyer in the City of Chicago. I have been licensed to practice law in the state of Illinois twenty-five years. I did have certain dealings concerning the purchase of property at 9730 South Western Avenue in the city of Chicago—I think it was in 1937. The property was six or seven vacant lots. [2 R. 56.] Government's Exhibit E–27 is an escrow agreement for the purchase of lots 32 and 33 in the subdivision at 97th and Western. There were $3,465 deposited in connection with that escrow in the Chicago Title & Trust Co. by myself, on April 26, 1937. I got that money from William R. Johnson in the form of currency. I paid that money over to the Chicago Title & Trust Co. for the purchase of lots 32 and 33 in Frederick H. Bartlett's Beverly Highland Subdivision. I purchased the property at the request of William R. Johnson. The title for that property was taken in the name of Isador Goldste , my law partner.

[1] All references which follow are to the record in Nos. 4 and 5, 1942 Term.

There was a deed executed from Isador Goldstein to Ann Homan, my stenographer, and a quit claim from Ann Homan, including the other lots, to William R. Johnson. I delivered the quit claim deed to Mr. Johnson. Government's Exhibit E–28, for identification, is an escrow agreement made between myself, the seller, and Chicago Title & Trust Company. The seller was Tim Quail, represented by Kilgallon. There was $3,150.00 deposited on that escrow. The property was lots 34 and 35 in Frederick H. Bartlett's Beverly Highland Subdivision, 97th and Western. I deposited the money myself, and received it in the form of currency from William R. Johnson. I made the purchase at the request of Mr. Johnson. Government's Exhibit, E–29, for identification, is an escrow agreement I entered into with Mr. Richard J. Edgeworth on April 26, 1937, to lot 31 in the same subdivision. There was $2,500 deposited with the Title & Trust Company in the form of currency received from Mr. Johnson. I made the purchase at the request of Mr. Johnson. The title was taken to that property in the name of Isador Goldstein, my law partner. A quit claim deed was delivered to William R. Johnson by myself.

I handled the escrow contained in Government's Exhibit E–30. It is concerning the purchase of Lots 38 and 39 in the Frederick H. Bartlett's Beverly Highland Subdivision. The seller is Mr. Tim Quail and Mr. Kilgallon. $4,000, in the form of currency, was deposited in connection with this escrow by me with the Chicago Title & Trust Co. I got the money from Mr. Johnson. I purchased the property at the request of Mr. Johnson. Title

was taken by Miss Ann Homan, my secretary. Subsequently a quit claim deed was made to William R. Johnson, which was delivered to him by myself.

I did have something to do with the purchase of the property known as the Albany Park Bank Building, at [2 R. 57] 3424 Lawrence Avenue. I went out to the Albany Park Building and interviewed a gentleman by the name of Mr. Larson, who was the chief clerk for Mr. Carter H. Harrison, Junior, who is the receiver for a number of banks closing out. They had an office out at that address. I had a conference with him in connection with the purchase of that building. After making a number of calls and negotiations I submitted an offer. I was requested by Mr. Johnson to go out there and purchase the building for him. The offer was submitted to the Treasury Department at Washington for approval and after it was approved I believe I made a deposit with Mr. Larson of five thousand dollars at the time. I received the money from Mr. Johnson, in the form of currency. There was a notice, I think, published in the newspaper that the building would be sold to the highest bidder at a certain date, at which time I appeared and bid, I think, around sixty thousand, fifty-nine thousand and some-odd dollars for it. I purchased that property at the request of Mr. Johnson. The exact amount of money expended for the purchase of that property I think was around $59,800. After looking at the closing statement I can state that the amount expended for the purchase of that property was $59,887.05. I got that from Mr. Johnson in the form of currency.

Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937.

I did have a part in the purchase of property known as the Bon Air Country Club. I acted at the request of Mr. Johnson. I think it was the latter part of 1937. I handled the negotiations for the purchase of it and after arriving at a price went out there, I think, on one or two occasions, at Mr. Johnson's request. I went out there and looked the premises over to see what it was like, and then I got in touch with Mr. Blumstein, who is the attorney for the Evanston Bank, in Mr. Poppenheusen's office, and Mr. Becker, who represented the bank, came down. We talked. It took about three or four months until we arrived at the price. The bank were the receivers. The price arrived at was $75,000. I think the initial deposit of $7,500.00 was deposited with Mr. Becker at the Evanston Bank and Mr. Blumstein, the attorney. I received the money from Mr. Johnson in the form of currency. The deposit was made [2 R. 58] in the office of Mr. Blumstein. The balance of $67,500 was paid over to Mr. Becker and Mr. Blumstein at their law offices, in the form of currency that I received from Mr. Johnson. Title to that property was taken in the name of Mr. Ted W. Goldstein. A quitclaim deed was subsequently delivered to William R. Johnson by myself. I think approximately 180 acres were involved in that transaction.

I had something to do with the acquisition of other property out in the neighborhood of this Bon Air Country Club. Government's Exhibit E–32, for identification, is an escrow that was executed by me. Seller was Mr. James A. Flynn. There was $8,000 in currency, received from Mr. Johnson, deposited on that escrow by myself. The property was purchased at the request of Mr. Johnson, and the title to that property was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed to Mr. William R. Johnson was delivered to him by myself. Lot 15 in the Columbia Gardens Subdivision was involved in that purchase. The transaction took place on May 16, 1938.

Government's Exhibit E–33, for identification, contains an escrow executed by me. Albert Tatge was the seller, and involves a house located at the Southwest corner of Milwaukee avenue and Chevy Chase Avenue. The amount of money involved is $8,500, deposited by myself on that escrow, and received from Mr. Johnson in the form of currency. It was deposited in the Chicago Title & Trust Co., April 1, 1938. The property described in Exhibit 33 was purchased at the request of Mr. Johnson. Title was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed was delivered to Mr. Johnson by myself.

I did execute the escrow contained in Government's Exhibit E–34, on May 2, 1938. The amount of money deposited was $4,000, with the Chicago Title & Trust Company, Escrow Department. The property involved is lots 25, 26 and 27, in that Columbia Gardens Subdivision. I pur-

chased that property at the request of Mr. Johnson and received the money deposited from him in the form of currency. Title to that property was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed was delivered to Mr. Johnson by myself.

I executed the document contained in Government's Exhibit E–37, for identification, on June 9, 1939. That involved about 175 or 180 acres adjoining the Bon Air. $60,000 w .s deposited in that escrow by myself. I received the money from Mr. Johnson in the form of currency. At [2 R. 59] his request I purchased that property. Title to that property was taken in the name of Abe Zimmerman. Subsequently a quitclaim deed was delivered by Mr. Abe Zimmerman to Mr. William R. Johnson.

I executed the escrow contained in Government's Exhibit E–38, on June 10, 1939. That involved 11 or 12 acres East of the Des Plaines River, opposite the Bon Air. The property I just described a moment ago, in connection with that $60,000 adjoins part of the property on the East side of the Bon Air and part on the West side of Milwaukee Avenue, within a short distance of this other property. There was $3,800 deposited by myself on that escrow. I purchased that property at the request of Mr. Johnson, from whom I received that money in the form of currency. Title was taken in the name of Mr. Abe Zimmerman. There was a quit claim deed from Abe Zimmerman to Mr. William R. Johnson delivered to him by myself.

I executed the escrow contained in Government's Exhibit E–35 for identification, on Novem-

ber 22, 1936. That involved 8 acres on Dempster Road, in the village of Morton Grove. It is not located with reference to any other property out there. It was formerly known as the Dells property. $10,000 was involved in that transaction. There was a deposit of that amount made with the Chicago Title & Trust Co. by myself. I received that $10,000 from Mr. Johnson in the form of currency and purchased that property at his request. Title was taken in the name of Isador Goldstein, my law partner. A quit claim deed was subsequently made by Isadore Goldstein to William R. Johnson and delivered to him by myself.

The escrow contained in Government's Exhibit E–36, for identification, was executed on February 10, 1937. That was 4 acres adjoining the 8 acres of the Dells property. $9,000 was involved in that transaction. I purchased the property at the request of Mr. Johnson, from whom I received the money deposited with the Chicago Title & Trust Co., in the form of currency. Title to that property was taken in the name of Isador Goldstein, who made a quit claim deed to Mr. William R. Johnson, which I delivered to him.

I executed the escrow contained in Government's Exhibit E–31 for identification on March 18, 1937. That involved 773 acres in DuPage County. Mr. Johnson requested me to get in touch with a gentleman who had an office in the First National Bank Building, and take up the matter of [2 R. 60] purchasing this particular property. It is known as the Cutten farm, or Sunny Acres farm, located in DuPage County, near Wheaton. After taking it up with this real

estate man we finally agreed on a price, and I reported to Mr. Johnson about it, and arranged for an appointment with Mr. Johnson and the sellers. The escrow was executed on March 18, 1937, at the Chicago Title & Trust Co. $145,000 was involved in that transaction. I met Mr. Johnson by appointment on that date in the lobby of the Chicago Title & Trust Co. Building. We went upstairs to the 5th floor, the escrow department, where we executed the escrow agreement. The $145,000 was in the form of currency. The bills were different size. It was a pretty good size package—I would not know just exactly—I guess it was wrapped up in paper. Mr. Johnson had that money when I met him in the lobby. We met this real estate man and Attorney Stickler of the Escrow Department and we arranged and executed this escrow agreement. Mr. Johnson and myself counted the money and went down to the cashier in the office of the Title & Trust Co. It took about an hour and a half or two hours to count the money. That is all that happened that day in connection with that transaction. Title to that property was taken in the name of Mr. William R. Johnson.

I have seen Government's Exhibit E–41, for identification, on April 12, 1937. That has relation to the Sunny Acres. The name was the Cutten Estates. I think 160 acres of land were involved in the purchase, adjoining to the East of the Sunny Acres farm. I had a conversation with the defendant Johnson before the purchase of this property. He told me he wanted to buy this farm adjoining this property. I got busy and found that an attorney by the name of

George W. Thoma, in Elmhurst, represented the seven or eight heirs who owned this property. We arrived at a price and purchased it. $16,500 was involved. I received that money from Mr. Johnson and deposited it at the Gary-Wheaton bank, in Elmhurst, in escrow. I received the money from Mr. Johnson. Title to the property was taken in the name of Isadore Goldstein, my law partner. Subsequently a quitclaim deed was made to that property by Isadore Goldstein to Mr. Johnson, which I delivered to him. That was about April 12, 1937.

I deposited the money with the Chicago Title & Trust Co. in connection with the purchase of some land adjoining the property to the Curran farm, which has relation to the [2 R. 61] escrow contained in Government's Exhibit E-39, for identification. This property was in between the Curran farm and the Bon Air properties, $10,000 was involved, covering some lots and acreage. The money was deposited with the Chicago Title & Trust Co., in the form of currency. I received it from Mr. Johnson, at whose request the deposit was made, on July 17, 1939. There were no other deposits made in connection with that property, but there were as to other properties in the same vicinity. The amount of money involved was $7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson. I made the deposit at his request.

I think there was another piece of property adjoining the Curran farm, of 11 acres, east of the DesPlaines river, that I purchased. Something like $1,350 was involved. I purchased that

property at the request of Mr. Johnson, from whom I received the money in the form of currency. That was about the same date or shortly after the Curran property was purchased. I think title was taken in the name of Abe Zimmerman. Subsequent, a quit claim deed was made to William R. Johnson, which I delivered to him. I delivered the quit claim deeds to Mr. Johnson personally. The money delivered to me by Mr. Johnson was personally delivered by Mr. Johnson.

I never did collect any rent from the property known as 9730 Western Avenue. I understand there was a one story building placed on that property. I talked to Mr. Creighton about having collected rent from that property. I see Mr. Creighton here in the courtroom (indicating the defendant Creighton). I think the conversation took place some time last year, I believe, I think in February or March of 1940 at my office. He came in to see me, and told me he had been over at the Federal Building and had a talk with the District Attorney in connection with the building, and he told him that he leased that property from me and was paying me five hundred a month. I told him it was not true. We got into a little discussion about it. He knows it was not true. He never gave me any money for rent on that building. I do not know anything about it. Then he said "I, of course, will insist upon that I did." He was going to insist that he paid me five hundred a month. He told some one in the District Attorney's Office that he was paying rent. I believe it was the time the Grand Jury investigation was going on. I have spoken of William R.

Johnson and I see him in the courtroom (indicating the defendant Johnson). That is [2 R. 62] the Johnson I have referred to during my testimony in regard to these real estate transactions, and with reference to these quit claim deeds to the property I have testified about here. That title to the property was taken in the name of Ted Goldstein and Homan and Abe Zimmerman, who took title in their names, were recorded by me and by me delivered to Johnson. The currency which I deposited in various amounts was in denominations from $10.00 up to $1,000.00. The denominations of the $145,000 in currency which defendant Johnson brought into the Chicago Title & Trust Co. were some thousands, five hundreds, hundreds, tens and twentys, I guess. There were some $100.00 bills in each instance.

Mr. THOMPSON. It is our desire to reserve cross-examination of this witness, and ask that he be instructed to return after we have had a chance to examine the many documents that have been referred to, all of these transactions that have been discussed here.

Mr. HURLEY. I object, if the Court please. Counsel here has been fully advised. He can examine the records. That is not a good ground.

Mr. THOMPSON. There is nothing in the bill of particulars regarding these transactions.

Mr. HURLEY. We mentioned the amount of money and certainly the amount of land.

The COURT. I didn't hear what you said.

Mr. THOMPSON. There is nothing in the bill of particulars regarding these transactions. This is the first knowledge I have had of all of these alleged transactions in the name of this man.

Mr. HURLEY. There is everything in the bill of particulars that the Court ordered; it complies with the Court's order.

The COURT. No. I think we will pursue the usual order. You may proceed with the cross-examination.

Cross-examination by Mr. THOMPSON:

I am a member of the law firm, Goldstein & Goldstein. The members are Isadore Goldstein and myself. There is one stenographer employed in the office and two lawyers, Clarence W. Shaver and William R. Peacock. There are no other people connected with the office in any way. I have no other business besides being a lawyer. I devote most of my time to the practice of law. With the rest of my time I [2 R. 63] publish a newspaper at Waukegan, Illinois. I devoted all my time to the practice of law in '37 and '38, up to the latter part of '39. When I was handling these transactions I was acting as attorney for Mr. Johnson. I consider him a friend, being friendly it was not a relationship between attorney and client; I didn't consider it that way. I just handled these transactions as a friend. I consider myself as having been a friend of Mr. Johnson for ten years or more, and the relation still continues to exist. There were four different transactions concerning the property on 97th and Western. An actual agreement as to the first transaction mentioned is E–27. Conveyance of the property was to be made by Isadore Goldstein, my law partner, and the second transaction, E–28, the conveyance was to made to Isadore Goldstein. The

third transaction, evidenced by E–29, the conveyance was to made to Isadore Goldstein. I did not take title to any of that property. The fourth transaction, E–30, conveyance was not made to me. Anna Homan took the title of the last property. I think the trust officer or escrow officer at the Chicago Title & Trust, wrote that Anna Homan in there. I do not know what "G. R." after her name means.

Q. Why did you have this stenographer take title to the fourth tract, whereas the other three were to your partner?

A. Well, they were adjoining property. My object was that if one party was trying to buy all that property that the price would be considerable more than what it was purchased for. I always took the title in the name of the nominee. Then after I consolidated it all I would issue one quit claim deed, but it is pretty hard to remember if that is what I did here. I couldn't remember the details of the transaction. I know there were deeds executed. That is all I could remember. I could not tell you definitely the detail about it. I do know who finally got title to the property. I believe that I recorded the deeds myself, or had the Chicago Title & Trust Co. record them. That is, I recorded the deeds or had conveyed the property to Mr. Johnson. The four tracts of land covered by the document we are talking about were, so far as I remember, conveyed to W. R. Johnson or William R. Johnson. My best recollection would be William R. Johnson. I did not say that I recorded the deed to each. I did not record the deed in that instance. I think I made

one quit claim deed to Mr. Johnson with respect to these four tracts we are now talking about. I think Anna [2 R. 64] Homan signed it. I am not sure about that. She was a single woman at that time. No, sir, she was married in between there sometime—I could not tell you just when. I do not remember whether my partner conveyed to Anna Homan or direct to Mr. Johnson—I do not recall. I do not recall if Mr. Johnson by these deeds that I drafted got title to all of this property. Naturally, if I see the deed I could explain it all in detail. My best recollection is that this property was conveyed to Mr. Johnson by deeds prepared by me and I delivered the deeds to Mr. Johnson. Whether the deed was executed direct by Ann Homan and Isadore Goldstein or whether or not Isadore Goldstein conveyed to Ann Homan and then to Johnson, or whether it was all of it or part of it I couldn't say unless I see the deed. I don't recall that offhand. I know there was some confusion about that particular piece of property—I mean on account of the transaction which involved four or five or six sellers. I don't recall. We tried to withhold information as to who was purchasing that particular property. I tried to withhold it for the purpose of trying to purchase it as cheap as I possibly could. I am not sure whether anybody else was interested in this particular piece of property, Mr. Thompson.

Q. When did you become uncertain about that, Mr. Goldstein?

A. I just happened to think at this moment.

Referring to defendant's Exhibit J-1, for identification, my recollection about whether or not

Mr. Johnson got title to this property is that he got an undivided one-half interest. I prepared that quit claim deed and it was acknowledged in my office. Clarence W. Shaver took the acknowledgment. That says that an undivided one-half interest was conveyed to William R. Johnson. Ann Homan and Raymond J. Homan, her husband, signed the deed. It covers Lots 38 and 39 in Bartlett's Beverly Highlands Subdivision, which are covered by the escrow agreement that is under Government's Exhibit E–30. I don't know whether I delivered this quit claim deed, Defendants' Exhibit J–1, for identification, to Mr. Johnson, or left it for him. I do not recall that particular instance.

Defendants' Exhibit J–2, for identification, conveys an undivided one-half interest to these lots to Mr. Johnson. The grantors are Ann Homan and Raymond J. Homan, who got title to this property through Isadore [2 R. 65] Goldstein, who quit claimed to them. They quit claimed a half interest to Mr. Johnson, and that deed covers Lots 31, 32, 33, 34 and 35, and those are the lots covered by escrow agreement identified as E–29, E–28 and E–27. That was acknowledged before William R. Peacock, a notary public in my office. He is an employee, as a lawyer, in my office. This deed was not delivered by me to Mr. Johnson. The two deeds pertaining to Western and 97th, I don't recall whether I left it for him or whether or not I delivered it in person.

I was a defendant in this indictment when it was returned and it was dismissed when this case was called for trial. I did not have any conversation with U. S. Attorney prior to the dismissal

of this indictment. I have talked to the U. S. Attorney three times about this case, after the dismissal. I had not talked to him about these matters in a general way many times before that. I am also a defendant in a pending indictment for perjury. I presume that relates to the investigation of this matter before the grand jury. That indictment is still pending as far as I know. I did not have any conversation with U. S. Attorney as to what disposition is going to be made of that indictment. He did not tell me that the disposition of that indictment will depend upon my performance in this case. We had no conversation whatsoever about the perjury indictment. Nobody representing the U. S. Attorney said anything to me about it. My lawyer has not told me anything about what the deal was. I have been attorney for William R. Skidmore for a good long while, who was also a defendant in this indictment before this case was called for trial. He was dismissed out of the indictment at the time it was called for trial. I have known William R. Skidmore twenty years. I have handled matters for him, I imagine, during that time. I do not recall as to how I became acquainted with Mr. Johnson. Skidmore may have introduced me to him.

Q. He is the man that owns the other half interest in this property out there that we have been talking about, at 97th and Western, isn't he?

A. As I remember it now, I think that is correct.

I guess that is right, but I made a quit claim deed to him for the other half.

Q. And, as a matter of fact, he is the one who brought the cash in to you, instead of Mr. Johnson, isn't he?

A. As I recall it, it was Mr. Johnson.

[2 R. 66] It is not true that Mr. Johnson knew nothing about this deal until after it was closed. As I recall it now, Mr. Johnson,—just to freshen was purchased, at 97th and Western, I believe Mr. Johnson sent the money down to me at the Chicago Title & Trust Co., with one of the gentlemen here. In that one instance, on that one or two lots, I don't remember. There was quite a number of transactions, and I just don't recall the details about it. I just didn't give the details of the particular transaction much thought. My recollection is that I made a deed to the half interest of this property and delivered it to William R. Skidmore. I did not say that my recollection is that Skidmore furnished me this cash to buy it. Skidmore did not furnish the money. Mr. Johnson sent it down to me. That is positive. I had a telephone conversation with Mr. Johnson and he told me he was sending a man down with that money to meet me at the Chicago Title & Trust Co. I remember that very distinctly. I did not have any telephone conversation with him about the second transaction. I saw him personally—I don't just recall where. He delivered that money to me in various amounts at various places on various days. It took us an hour and a half or two hours to count the $145,000. Both of us were counting it. It was tens, twenties, fifties, hundreds, and that is quite a package. If you could count it any faster

I don't know. I imagine it took us an hour and a half—I can't recall the exact time.

I am almost certain I know Skidmore's handwriting. That is Mr. Skidmore's handwriting, Defendants' Exhibit J-3, for identification. That does not refresh my recollection as to any particular deal I had.

The amounts there of ten thousand and the nine thousand, are not identical with the amounts paid for the Dells property. I think the Dells property was more than ten and nine thousand. It was purchased subject to some taxes. My testimony up to this point is that it cost ten thousand and nine thousand. I know the amounts are on there, but I don't know what it is. I don't know if it is an escrow amount, the first deposit. I handled the money, yes, but I don't know whether I handled this particular money that is marked here. They are figures—that is all I know. I do not know that Skidmore handed me that amount of money that is there on that slip. That slip indicates that there was ten thousand of the twenty thousand dollars invested paid by [2 R. 67] somebody—I don't know what it is. I don't know that that is an accounting between Mr. Skidmore and Mr. Johnson with respect to the purchase of the Dells property. I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price. Sam Hare is the gentleman who I knew that used to operate the place before it burned down. I don't know the Barrett who is mentioned on this slip. Lawyer Herman is the attorney that represented the seller, I believe. I presume the Goldstein mentioned in here is me.

There are other Goldsteins, however. I guess that the Goldstein that got $750. out of this deal was me. Referring to Government's Exhibits, E–35 and 36, which are the two documents that I have already identified, the first one shows $10,000 as the consideration for the first part of the Dells property, subject to all unpaid taxes, forfeitures, sales, etc. I did not mention all of them when I first testified. You did not ask me the question. And the second one shows $9,000 for the second tract, subject to all unpaid general taxes, tax sales and tax forfeitures. I went over my testimony regarding the Dells property yesterday, and today with the U. S. Attorney, and the amount of money. That is all.

Q. Did you tell him that Skidmore owned half of these two pieces that I have talked about?

A. I don't remember that, Judge Thompson. I didn't remember that. I was of the opinion that Mr. Johnson owned it all. Had I remembered, I would not have said so.

Mr. THOMPSON. If the Court please, that is all we know about this testimony up to the present and therefore we ask to reserve further cross-examination until we have had a chance to inspect the rest of these properties.

Mr. HURLEY. I object to any reservation in that respect. If counsel wants to cross-examine this man he can do it now.

The COURT. From what has been indicated in the opening statement of counsel this is going to be a long trial. It is going to be difficult for the jury and the court to follow the testimony. Accordingly I will have to ask you to cross-examine the witnesses as they are produced unless

some special reason arises or unless counsel agree. If you have any further cross-examination, cross-examine this witness now.

Mr. THOMPSON. If the Court please, we have no further information and if we get further information that bears on these matters we will want to call this witness again.

[2 R. 68] The COURT. All I am doing now is ruling you to proceed with the cross-examination if you have any, and you will do that.

Mr. THOMPSON. Well, we have no further cross-examination now. We have no further information with respect to the matter.

Re-direct examination by Mr. HURLEY:

When I was testifying on direct examination I did not have Defendants' Exhibits J–1 and J–2 before me, and I testified on cross-examination that a certain gentleman here in the courtroom delivered that first money for the payment of 9730 Western Avenue. That was Mr. Creighton, whom I identified here today.

(Thereupon Government's Exhibits E–69 and E–70 were offered and received in evidence, over the objection of the defendants, on the ground that they are immaterial and do not prove any issue in this case.)

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APPENDIX B

WILLIAM R. JOHNSON

Statement of receipts and expenditures

Record citations	1932		1933		1934		1935		1936	
	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures
Balance forward	[1] $78,000.00		$127,410.17		$134,215.93		$175,547.93		$116,837.78	
Items of cash receipts										
Per Income Tax Returns (Govt. Exs. R-6—R-13)	70,677.54		74,667.81		116,214.53		57,878.88		161,892.74	
Additional (4 R. 47)	(415.56)		2,097.13		16,129.36		605.39		1,132.70	
Depreciation Allowed (Govt. Exs. R-6—R-13)	3,067.41		3,067.41		9,007.35		9,912.68		10,410.77	
Investments Recovered (3 R. 959-960, 970, 993; Govt. Ex. R-6)	289.45		2,083.51		4,015.91		5,076.18		7,466.37	
Items of expenditure										
Income Taxes Paid (Govt. Exs. R-90—R-104)		88,841.11		88,610.10		27,903.00		41,372.56		820.60
Payment of Mortgage—2141 So. Crawford Ave. (3 R. 972, 992)				5,000.00						
Payment of Mortgage—4020 Ogden Ave. (3 R. 972, 992)		500.00		8,500.00						
Purchase of Liberty Bonds (3 R. 976-977, 993)				5,000.00						
Lincoln Park Bldg.:										
Purchase of Equity (2 R. 12)						16,000.00				
Payment of 2nd Mtge. (2 R. 13, 15; Govt. Ex. E-9)		4,750.00		38,000.00						
Payment of 1st Mtge. (2 R. 36; Govt. Ex. E-12)						25,000.00		75,000.00		50,000
Delinquent Taxes (2 R. 430)						15,205.48				
Improvements (Govt. Exs. R-8—R-13, E-16—E-20)						6,030.05		2,059.91		4,300
Furnishings (Govt. Exs. R-8—R-13, E-16—E-20)						3,076.40		3,453.81		2,000
Thorndale-Glenwood—Furnishings (Govt. Exs. R-8—R-13, E-21—E-25)						730.22		326.00		1,000
Albany Park Bank Bldg.—Purchase of (2 R. 3-4, 57)										
9739 So. Western Ave.:										
Purchase of land (2 R. 55-56, 118; 4 R. 8; Govt. Exs. E-27—E-30)										
Buildings (2 R. 75, 79, 83-84, 88-89, 117-118; 4 R. 8)										
Sunny Acres Farm:										
Purchase of (2 R. 60; 3 R. 982; Govt. Ex. E-31)										
Capital Items and Expenditures (3 R. 993; 4 R. 5-6, 10)										
Personal (3 R. 993; 4 R. 5-6, 10)										
Bon Air Catering Co.:										
Purchase of Property (2 R. 57-58; Govt. Exs. E-32—E-34)										
Improvements (2 R. 51, 54, 118; 3 R. 957, 983, 992; Govt. Exs. E-46—E-53)										
Curran Farm—Purchase of (2 R. 58-59; Govt. Exs. E-37, E-38)										
Columbian Gardens Real Estate—Deposit of Currency (2 R. 60-61; 3 R. 575-576; Govt. Ex. E-39)										
Du Page County Real Estate—Purchase of (2 R. 60, 3 R. 594, 982; Govt. Ex. E-41)										
The Dells—Purchase of (2 R. 59, 66-67; 3 R. 955, 992-993; Govt. Exs. E-35, E-36)										10,000
Loan to Wm. R. Skidmore (2 R. 411)										
Interest Paid (3 R. 993)		117.56								
Living Expenses (3 R. 978)		10,000.00		10,600.00		10,600.00		10,600.00		10,600
Balance on hand (3 R. 976) 12/31/1939										
		24,208.67		75,110.16		104,035.45		132,213.28		94,837
Balance forward		[1] 27,410.17		134,215.93		175,547.93		116,837.78		202,900
Totals	154,618.84	151,618.84	209,326.03	209,326.03	279,583.08	279,583.08	249,051.06	249,051.06	297,740.36	297,737

[1] Stated cash on hand Jan. 1, 1932 (2 R. 10).

[2] Stated cash on hand Dec. 31, 1939 (3 R. 976).

APPENDIX B

WILLIAM R. JOHNSON

Statement of receipts and expenditures

34	1935		1936		1937		1938		1939		Grand total			
Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures				
	$175,547.93		$116,837.78		$202,919.89						$78,000.00			
	57,878.88		161,892.74		248,660.18		$101,946.68		$251,715.47		1,083,653.83			
	605.39		1,132.70								19,549.02			
	9,942.68		10,410.77		15,354.95		19,028.47		17,170.51		87,049.55			
	5,076.18		7,466.37		5,573.71		10,506.10		1,178.22		36,189.45			
$27,963.00		$41,373.50		$20,062.18		$78,550.70		$128,399.72		$34,530.94		$348,361.31		
												5,000.00		
												9,000.00		
												5,000.00		
16,000.00												16,000.00		
												42,750.00		
25,000.00		75,000.00		50,000.00								150,000.00		
15,205.48												15,205.48		
6,030.05		2,059.91		4,398.72		18,274.90		3,680.09		266.08		32,708.85		
3,076.40		3,453.81		235.57						2,090.19		8,855.97		
730.22		326.00		124.00		102.75		106.00				1,388.97		
						59,887.05						59,887.05		
						13,115.00						13,115.00		
						22,400.00						22,400.00		
						145,000.00						145,000.00		
						102,223.00		12,375.27		12,964.56		127,562.83		
						3,238.14		3,002.49		4,645.24		10,885.77		
						75,000.00		20,056.73				95,056.73		
								273,940.93		274,847.34		548,788.27		
										63,800.00		63,800.00		
										17,500.00		17,500.00		
						16,050.00						16,050.00		
				10,000.00		12,115.90						22,115.90		
								37,000.00				37,000.00		
						1,280.02						1,397.58		
10,000.00		10,000.00		10,000.00		10,000.00		10,000.00		10,000.00		80,000.00		
													$850,000.00	
104,035.15		132,213.28		94,820.47		555,236.56		488,561.23		420,644.25		1,894,829.71	50,000.00	
175,547.93		116,837.78		202,919.89		82,727.83		357,079.98		150,580.05		590,387.86	50,000.00	$640,387.86
279,583.08	249,051.06	249,051.06	297,740.36	297,740.36	472,508.73	472,508.73	131,481.25	131,481.25	270,064.20	270,064.20	1,304,441.85	1,304,441.85		

[1] Red figures represent excess of expenditures over cash receipts and other cash resources.